

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

RUBEN ESCANO, )  
 )  
Plaintiff, )  
 )  
vs. ) NO: 23-CV-277 MLG-GJF  
 )  
INNOVATIVE FINANCIAL PARTNERS, )  
 )  
LLC, d/b/a INNOVATIVE )  
 )  
FINANCIAL GROUP, and JOSH )  
 )  
BENSON, )  
 )  
Defendants. )

TRANSCRIPT OF PROCEEDINGS  
EVIDENTIARY MOTIONS HEARING  
BEFORE THE HONORABLE GREGORY J. FOURATT  
UNITED STATES MAGISTRATE JUDGE  
TUESDAY, SEPTEMBER 19, 2023  
9:06 A.M.  
LAS CRUCES, DOÑA ANA COUNTY, NEW MEXICO

(Proceedings recorded by machine shorthand and  
transcript produced by Computer-Aided Transcription.)

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UNITED STATES DISTRICT COURT  
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15                    BY: DAVID MEADOWS, ESQ.

16

17                    and

18

19                    ATKINSON BAKER & RODRIGUEZ, PC  
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22                    BY: OWEN EUGENE BARCALA, ESQ.

23

24     Also present: Alexander Donald Terepka, Esq.

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1			
2	7 Not identified on the record		9
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1 (In Open Court at 9:06 A.M.)

2 THE COURT: Okay. We are on the record in Ruben  
3 Escano versus -- I'm just going to call it "Innovative  
4 Financial Group" and, hereafter, we probably all will say  
5 "IFG" -- and Josh Benson, 23-CV-277, a case assigned to  
6 Judge Garcia. Ruben Escano is here for himself.

7 Mr. Escano, good morning. Sorry about the snafu  
8 at the front. I didn't think about it and --

9 MR. ESCANO: That's okay. Thank you for granting  
10 me permission.

11 THE COURT: Sure. Alex Terepka, Owen Barcala,  
12 and somebody whose name, I think, is David Meadows.

13 MR. MEADOWS: Correct, Your Honor.

14 THE COURT: Mr. Meadows, have you entered your  
15 appearance in this case?

16 MR. MEADOWS: Yeah, I filed a pro hac motion and  
17 it was --

18 MR. BARCALA: We had filed a pro hac motion some  
19 time ago --

20 THE COURT: "Some time ago"?

21 MR. BARCALA: It was a couple weeks ago.

22 THE COURT: Which of those two law firms are you  
23 affiliated with, if either?

24 MR. MEADOWS: With Watstein Terepka.

25 THE COURT: You just said *Terep-ka*. I

1 mispronounced it --

2 MR. MEADOWS: Something I've been struggling with  
3 since I joined the firm, but, yes.

4 MR. TEREPKA: The Court had it right, Your Honor.

5 THE COURT: Okay. Judge Garcia has referred -- I  
6 mean, technically, it's five motions to me for what we call  
7 here in New Mexico "proposed findings and recommended  
8 disposition." Everybody says "PFRD"; other federal  
9 districts call it a "report and recommendation." The most  
10 important of these are the defendants' motion to enforce the  
11 settlement agreement, to dismiss the case, and obtain fees.  
12 The redacted version of that is Document 24. Its unredacted  
13 companion is Document 26. Mr. Escano has filed a motion for  
14 reconsideration of the order to submit closing documents.  
15 That is Document 30. These motions are fully briefed and  
16 they are the most important before the Court today. The  
17 other two motions are simply motions to seal certain  
18 documents or portions. I don't need evidence or argument on  
19 those.

20 So, gentlemen, here's my plan today: I'm going  
21 to take evidence in the form of exhibits that I admit and  
22 witness testimony as to the two most important motions.  
23 Happily, the witness lists have substantial overlap within  
24 them. The two primary witnesses appearing on both. Dee  
25 McKinney was on the defendants' list. First of all, is that

1 is lady or a man?

2 MR. MEADOWS: It's a woman, Your Honor.

3 THE COURT: Is she expected to testify?

4 MR. MEADOWS: She is, Your Honor. She's here.

5 THE COURT: Okay. So let's talk about exhibits.

6 Right now, there are five proposed exhibits proffered by  
7 Mr. Escano and 51 proffered by the defendants. Have the  
8 parties discussed stipulating to the admissibility of all or  
9 some of them?

10 MR. MEADOWS: Yes, Your Honor. We reached out to  
11 Mr. Escano by email, I believe it was last week, and  
12 indicated to him that, if he was willing to stipulate to our  
13 exhibits, we'd be happy to stipulate to the admissibility of  
14 his. We never heard back. So we don't have a stipulation  
15 as to admissibility of anything right now, unfortunately.

16 THE COURT: Let me start with you, Mr. Meadows.  
17 Do the defendants have any objection to the five exhibits  
18 proffered by Mr. Escano?

19 MR. MEADOWS: We do not.

20 THE COURT: I will admit, for the purposes of  
21 this hearing, Plaintiff's Exhibits 1 through 5.

22 (Plaintiff's Exhibits 1-5 were admitted into evidence.)

23 Mr. Escano, when you address the Court, please  
24 stand up. I'm going to ask you an overall question first  
25 and then follow-up questions if necessary.



1           What is your view about the admissibility of the  
2   51 exhibits proffered by the defense?

3           MR. ESCANO: Everything looks fine, except three  
4   exhibits.

5           THE COURT: What numbers are they?

6           MR. ESCANO: Defendants' Exhibits 19, 20, and 21.

7           THE COURT: Give me just a moment. So, but for  
8   those, I'm taking it, sir, that you have no objection to me  
9   admitting for the purposes of this hearing the remaining 48  
10   exhibits?

11          MR. ESCANO: Correct.

12          THE COURT: All right. I'll make that ruling  
13   now. Let me find those exhibits in my stack.

14   (Defendants' Exhibits 1-18 and 22-51 were admitted into  
15                                   evidence.)

16          THE COURT: Okay. Let's start with -- and I'm  
17   just trying to figure out the legal basis for your  
18   objections right now. So I'm looking at Exhibit 19. And  
19   tell me what the legal basis is on which you object to the  
20   admissibility of Exhibit 19.

21          MR. ESCANO: So, Your Honor, may I -- I should  
22   just cut to the chase. As long as I have an opportunity to  
23   examine, to question, the accountant related to this matter,  
24   these exhibits should be okay. But I want to question the  
25   accountant as to what these exhibits are, what's going on

1 here, what these numbers mean.

2 THE COURT: Okay. I promise, you'll have the  
3 opportunity.

4 MR. ESCANO: Okay.

5 THE COURT: Well, I mean, I'm not defense  
6 counsel.

7 Mr. Meadows, as you understand the evidence that  
8 you expect, I believe, from Ms. McKinney, will she be  
9 discussing what have been marked for identification as  
10 Defense Exhibits 19 through 21?

11 MR. MEADOWS: Yes, Your Honor.

12 THE COURT: All three?

13 MR. MEADOWS: Yes.

14 THE COURT: All right.

15 Does that give you the assurance, Mr. Escano?

16 MR. ESCANO: Yes.

17 THE COURT: So I will then admit, for the  
18 purposes of this hearing, Exhibits 19 through 21.

19 (Defendants' Exhibits 19-21 were admitted into evidence.)

20 THE COURT: Okay. Let me tell you how this  
21 morning is going to roll. Technically, each side has filed  
22 a motion. Because the defendants filed the first motion,  
23 they are going to present their case in chief first.

24 Mr. Escano, you have the ability to cross-examine  
25 the witnesses that are called by the defendants. It's going

1 to get a little weird when that person is you. You will --  
2 the witness stand is right here (indicating). You will be  
3 seated there to answer questions on direct examination from  
4 whichever of the lawyers is questioning you. Because you  
5 have the opportunity to cross-examine every witness, that  
6 includes you. Cross-examining yourself is kind of  
7 metaphysically difficult to understand. So I'm going to  
8 allow you to present, really, what is narrative testimony as  
9 a substitute for cross-examining yourself. And then, once  
10 you're done with your narrative testimony, they have a  
11 chance to do redirect examination.

12 And so let me start a new paragraph. Mr. Escano,  
13 technically, in his case in chief, could recall Mr. Terepka  
14 and he could recall himself. I don't normally allow  
15 recross-examination, but today I'm going to permit it for  
16 two witnesses to save us the trouble of a separate and often  
17 redundant defense case. So with respect to witnesses  
18 Terepka and Escano, I'm going to allow each side to testify  
19 twice. So, technically, it's direct, cross, redirect,  
20 recross. But that's the reason I'm doing it.

21 Any objection to that plan, Mr. Escano?

22 MR. ESCANO: No, Your Honor.

23 THE COURT: Mr. Meadows, any objection?

24 MR. MEADOWS: No, Your Honor.

25 THE COURT: Okay. For Ms. McKinney, there won't

1 be any recross-examination; she's in a different category.

2 And, gentlemen, I reserve -- because it's an  
3 evidentiary hearing and I'm making findings, I reserve the  
4 right to ask questions of any witness at any time. That  
5 will conclude the evidence. I am going to permit the  
6 parties a chance to make something in the nature of closing  
7 argument or summation or legal argument after the evidence  
8 is closed. That will be done from the lectern.

9 The court reporter today is Vanessa Alyce,  
10 A-L-Y-C-E. In many ways, she's the most important customer  
11 that we have. Gentlemen, I urge you please to speak  
12 clearly, to speak in an audible voice, don't talk over each  
13 other or the witnesses. If you use acronyms or terms of  
14 art, please, the first time, if you remember, spell it out  
15 so that she gets it correct on the transcript.

16 We should plan on a ten-minute break somewhere  
17 between the hour and a half and the two-hour mark. If  
18 Ms. Alyce needs a break sooner than that, she has the ace of  
19 spades in today's card game and she gets a break when she  
20 needs it.

21 I don't think it is necessary for any person  
22 today to say in open court the actual amount of the  
23 settlement or the actual amount of the backup withholding.  
24 First of all, there's no dispute about those amounts. They  
25 are before the Court in the record. This is technically a

1 public hearing and so let's avoid saying those numbers. Is  
2 there anything else that is so confidential that we should  
3 guard against it being said in open court?

4 Mr. Escano, what's your view on that?

5 MR. ESCANO: I don't have any position on that.

6 THE COURT: Mr. Meadows?

7 MR. MEADOWS: No, Your Honor.

8 THE COURT: All right. Okay. That's -- I've  
9 cleared away the underbrush.

10 Are the defendants prepared to call their first  
11 witness?

12 MR. MEADOWS: Yes, Your Honor. We would start  
13 with Mr. Terepka.

14 THE COURT: All right. Mr. Terepka, please come  
15 forward.

16 **ALEXANDER TEREPKA,**

17 After having been first duly sworn, did make the  
18 following answers:

19 **DIRECT EXAMINATION**

20 THE COURT: Have a seat.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: Make yourself comfortable. Tell us  
23 your full name for the record and spell your last name for  
24 the court reporter.

25 THE WITNESS: My name is Alexander Terepka. That

1 is spelled, T-E-R-E-P-K-A.

2 MR. MEADOWS: Your Honor, just an opening  
3 question, if I may. We're going to have a number of  
4 exhibits to hand up to Mr. Terepka. Do you have a protocol  
5 for that or may I just go ahead and hand them to him?

6 THE COURT: Are you going to want to hand them to  
7 him or are you going to use the document camera?

8 MR. MEADOWS: We were going to plan to hand them  
9 up, which seems easier.

10 THE COURT: Because the jury isn't here, I'll  
11 allow you to approach the witness without asking for  
12 permission.

13 Mr. Escano, that rule goes for you as well.

14 MR. ESCANO: Yes, Your Honor.

15 MR. MEADOWS: Thank you, Your Honor.

16 Q. (BY MR. MEADOWS): Mr. Terepka, where do you  
17 reside?

18 A. Atlanta, Georgia.

19 Q. And are you currently employed?

20 A. I am.

21 Q. How so?

22 A. I'm a partner at the law firm Watstein Terepka.

23 Q. How long have you been a practicing lawyer?

24 A. More than ten years.

25 Q. Could you please, just for the Court's benefit, give a

1     brief outline of your legal experience since graduating from  
2     law school?

3     A.    After I graduated from law school, I clerked for two  
4     federal judges; first, the chief judge of the United States  
5     District Court for the Central District of California and  
6     then for a United States Circuit Judge on the Ninth Circuit  
7     Court of Appeals.  After completing those two years, I  
8     worked at the law firm Munger, Tolles and Olson in Los  
9     Angeles for about four and a half years doing complex  
10    commercial litigation.  After that, I moved to the law firm  
11    Jones Day, also in Los Angeles, where I practiced, for more  
12    than a year, complex commercial litigation.  I then moved to  
13    Atlanta and joined the law firm Kabat, Chapman and Ozmer  
14    where I began practicing TCPA defense all across the country  
15    for a number of years, about two years.  And six months ago,  
16    I cofounded the law firm where I currently work, Watstein  
17    Terepka.

18    Q.    Now, what is your role in the case we're here to talk  
19    about today, the Escano versus IFP defendants?

20    A.    Lead Counsel for the defendant.

21    Q.    In acting as lead counsel for defendants, have you  
22    become familiar with the claims Mr. Escano is asserting  
23    here?

24    A.    Yes.

25    Q.    What's the nature of those claims?

1       A.     The nature of those claims is that Mr. Escano alleges  
2       that defendants were involved in placing 19 telephone calls  
3       to him several years ago and that those calls violated the  
4       TCPA, the Telephone Consumer Protection Act, and also state  
5       laws.

6       Q.     Now, I think you mentioned a moment ago that you've  
7       got some experience with TCPA cases. Can you tell us about  
8       that, please?

9       A.     Yes. I've defended dozens of TCPA cases across the  
10      country and have appeared in district courts across the  
11      country for that purpose. And, in fact, it's an area that  
12      my law firm specializes in.

13      Q.     Now, prior to this case, in your experience working on  
14      TCPA cases, had you reached a settlement of any of those  
15      sorts of claims?

16      A.     Many.

17      Q.     Can you give us an estimate at least of how many?

18      A.     At least a dozen, probably dozens.

19      Q.     Now, in those dozen prior examples, were you involved  
20      in the preparation of settlement agreements?

21      A.     I was.

22      Q.     And were you involved in the negotiation of settlement  
23      agreements?

24      A.     Yes.

25      Q.     When you were brought onto this case, Mr. Terepka, was



1 Mr. Escano represented by counsel?

2 A. No.

3 Q. Now, early on in the case, did you do any research  
4 about Mr. Escano to try to gauge his experience with the  
5 litigation process?

6 A. I did.

7 Q. What did you find?

8 A. I found that he was extremely experienced and that he  
9 had filed at least seven other TCPA lawsuits that are  
10 pending in this district. And so my estimation of that was  
11 that he was extremely experienced in this area and falls  
12 into the genre that we know in the industry as a "serial  
13 TCPA litigant."

14 Q. Now, in your role as lead counsel for the defendants,  
15 have you communicated with Mr. Escano as this case has gone  
16 on?

17 A. I have.

18 Q. How so?

19 A. By phone and email.

20 Q. Did you develop any impressions as to Mr. Escano's  
21 abilities with regard to litigation?

22 A. I did.

23 Q. Can you describe those for us, please.

24 A. My impression of Mr. Escano's legal abilities is that  
25 they're exceptional. And the reason for that is, from the

1 very start of the case when we began exchanging letters and  
2 discussing the merits on the phone, he would have extreme  
3 familiarity with the TCPA. In fact, at one point, he was  
4 explaining to me why he disagreed with a Sixth Circuit case  
5 on a point of law that was relevant to our discussion and  
6 was quoting to me statutes and regulations explaining that,  
7 well, in his view, those statutes and regulations were  
8 inconsistent with the Sixth Circuit's ruling. So at one  
9 point, I was so impressed that I told him, "I think you  
10 should go to law school."

11 Q. I'm going to hand up a document marked as Defendants'  
12 Exhibit 1.

13 MR. MEADOWS: And, Your Honor, just to make sure,  
14 you have a copy of the exhibit binder?

15 THE COURT: I do.

16 MR. MEADOWS: Okay. Great. Thank you.

17 Q. (BY MR. MEADOWS): Mr. Terepka, do you  
18 recognize Exhibit 1? I should say "Defendants'  
19 Exhibit 1."

20 A. Yes. This is the executed settlement agreement that  
21 the parties reached in this matter.

22 Q. Did you have any role in preparing this document?

23 A. I did.

24 Q. Could you describe that, please.

25 A. Once the parties had gotten to the point of

1 preparing -- agreeing to settle the case and wanting to  
2 memorialize their agreement in one document, defendants  
3 prepared the first draft and sent it to Mr. Escano.  
4 Mr. Escano then sent back redlines; defendants sent a  
5 subsequent redline. In that way, the parties prepared the  
6 agreement together until they executed it.

7 Q. Let me ask you briefly, do you recognize the  
8 signatures on page 6 of Exhibit 1?

9 A. I do.

10 Q. And it looks like the first signature is Mr. Escano's?

11 A. Yes.

12 Q. How do you -- why is it that you recognize that?

13 A. Because I've seen it on a number of documents.

14 Q. Now, could you tell us who signed the agreement on  
15 behalf of Innovative Financial Partners?

16 A. Lindsey Boyd, the in-house counsel on this matter.  
17 She is counsel at Humana, Inc., which is the parent company  
18 of Innovative Financial Partners.

19 Q. And then it looks like there's one other signature.  
20 Do you recognize that one?

21 A. That's defendant Josh Benson.

22 Q. Now, Mr. Terepka, in the course of negotiating this  
23 settlement agreement with Mr. Escano, did you have any  
24 particular priorities that you were looking to achieve?

25 A. Yes. So the main priority, really, for any settlement

1 in a case like this is to reach a full and final agreement  
2 that memorializes all the terms of the settlement and brings  
3 the matter to a close. And that's a very important goal  
4 from the defense perspective because the purpose of these  
5 settlements is, very often, to avoid further litigation  
6 expenses.

7 Q. In your view, did you achieve those priorities in  
8 arriving at the final settlement agreement?

9 A. Yes.

10 Q. There's a few specific sections in Exhibit 1 that I'd  
11 like to ask you about, starting with Section 5, which is on  
12 page 2. And just for the benefit of everyone, would you  
13 please read the two sentences that make up Section 5.

14 A. (Reading) "Tax liability. Plaintiff agrees the  
15 released parties make no warranty or representation about  
16 plaintiff's tax liability for the settlement payment.  
17 Plaintiff agrees that he is fully and solely responsible for  
18 any and all of his own tax liabilities with respect to the  
19 settlement payment."

20 Q. Mr. Terepka, how did Section 5 come to be a part of  
21 this agreement?

22 A. Section 5 is a standard term in settlement agreements  
23 like this, in my experience, that's meant to protect  
24 defendants from the claim that plaintiffs may make that  
25 defendants owe an amount in addition to the settlement

1 amount reflected in the settlement agreement. And the --  
2 but the language of both sentences confirms that.

3 Q. Now, let's start with the first sentence; I want to  
4 follow up on that briefly. It begins with the words  
5 "plaintiff agrees." From your perspective as defendants'  
6 counsel, what's your understanding of why we see that phrase  
7 at the beginning of that sentence?

8 A. Because both sentences agree [sic] with "plaintiff  
9 agrees." And the reason for that is that plaintiff is  
10 agreeing to both sentences to protect the defendants.  
11 Defendants aren't agreeing to anything and that's -- in this  
12 section. And that's why both sentences begin with the words  
13 "plaintiff agrees."

14 Q. Now, of course, we see that Section 5 relates to the  
15 issue of tax liability. Let me ask you, are there any other  
16 parts of this settlement agreement that relate to the issue  
17 of tax liability?

18 A. No. I mean, this is the only one. And the first  
19 sentence says that the plaintiff agrees that the defendants  
20 aren't making a warranty or representation, one way or the  
21 other, about tax liability. And the second sentence says  
22 that plaintiff agrees he is responsible for the tax  
23 liabilities with respect to the settlement agreement;  
24 meaning, that, to the extent there are any tax liabilities  
25 on the settlement amount, those come out of the settlement

1 amount, not defendants' pocket.

2 Q. I want to move on to Section 18 of the agreement,  
3 Defendants' Exhibit 1. It's on page 4 of 6. And in  
4 particular, might I ask you to read the final sentence of  
5 Section 18.

6 A. (Reading) "The parties agree that in any matter,  
7 motion, or action arising from or relating to the  
8 enforcement of breach of any provision of this agreement,  
9 the prevailing party will be entitled to reasonable  
10 attorney's fees and expenses."

11 Q. How did that sentence come to be a part of this  
12 agreement?

13 A. That is another standard term that the defendants  
14 proposed in their original draft of the settlement.

15 Q. Was including this sentence in this agreement one of  
16 your priorities, acting as defense counsel?

17 A. Yes. This is a very important term, from the defense  
18 perspective, because it ensures that the defendants will not  
19 incur any additional expenses from the litigation after  
20 settling it, which is a key priority of settling. So this  
21 term is key because, to the extent defendants need to  
22 enforce the settlement or to the extent plaintiff breaches  
23 it, the fees are shifted to the prevailing -- in favor of  
24 the prevailing party in that event.

25 Q. Moving on to one other section of the agreement,

1 please, which is Section 21. And, in particular, would you  
2 please read the first sentence of that section.

3 A. (Reading) "The parties to this matter have read and  
4 understand this agreement and have had the opportunity to  
5 consult legal counsel in any negotiation, drafting, and  
6 execution of this agreement; although, plaintiff has  
7 declined to consult with legal counsel."

8 Q. Now, in your work on the settlement agreement and your  
9 negotiations with Mr. Escano, did you find it to be true, in  
10 fact, that he did not consult with legal counsel?

11 A. Yes. As far as I could tell, Mr. Escano was  
12 representing himself, as he said he was.

13 Q. Now, did Mr. Escano, in your estimation, participate  
14 actively in the negotiations of this settlement agreement?

15 A. Yes, very actively.

16 Q. Did he participate actively in the drafting of the  
17 settlement agreement?

18 A. Yes. In fact, he had redlines that -- significant  
19 redlines, and the defendants adopted many of his proposed  
20 changes.

21 Q. From your perspective, Mr. Terepka, did Mr. Escano  
22 appear to know what he was doing?

23 A. Very much so.

24 Q. Let me ask you, then, a few additional questions about  
25 the negotiations leading up to the final settlement

1 agreement. If you can recall, when did the parties first  
2 come to an agreement on the terms of their settlement?

3 A. I believe in early April, but a document would help  
4 refresh my recollection.

5 Q. I'm going to show you a document that's been marked as  
6 Defendants' Exhibit 3.

7 Mr. Terepka, do you recognize Defendants'  
8 Exhibit 3?

9 A. I do. This is a copy of emails between me and  
10 Mr. Escano between March and May of this year.

11 Q. All right. Now, I recognize there are many emails  
12 that are a part of Defendants' Exhibit 3. If I could ask  
13 you to focus on an email dated April 6<sup>th</sup>. And I'm going  
14 to apologize, we don't have page numbers on this exhibit,  
15 but it's maybe two-thirds of the way through the exhibit.

16 A. Yes. I see the April 5<sup>th</sup> and April 6<sup>th</sup> emails.

17 Q. All right. Could you describe the April 5<sup>th</sup> email  
18 that you just referenced. Could you briefly describe that  
19 to the Court and what you understood to be communicated  
20 there.

21 A. This is an email from Mr. Escano to me where he says  
22 that he accepted -- he accepts the terms proposed during our  
23 phone call today for the settlement amount.

24 Q. And then how do you respond to that email?

25 A. The following day, on April 6<sup>th</sup>, I wrote an email to



1 summarize what we had discussed and the terms that  
2 Mr. Escano accepted in this email.

3 Q. And could you briefly describe what the terms of the  
4 settlement were, as they were agreed to at that time?

5 A. In exchange for the settlement amount, Mr. Escano  
6 would accept a number of terms, including a general release,  
7 a specific release of all claims against anyone related to  
8 the calls that Mr. Escano claimed were on behalf of IFG; in  
9 addition to that, confidentiality and non-disparagement in  
10 favor of IFG.

11 Q. Now, I just want to briefly ask you about the date of  
12 this email within Exhibit 3. Again, it's April the 6<sup>th</sup>.  
13 How does that compare to the date on which the final  
14 agreement was signed?

15 A. The final agreement was executed on May 4<sup>th</sup>, so this  
16 is not quite a month before that.

17 Q. All right. Thank you.

18 Now, going back to those four material terms that  
19 you just outlined which are summarized in your  
20 April 6<sup>th</sup> email, were all of those incorporated into what  
21 we saw as the final settlement agreement in Exhibit 1?

22 A. They were not.

23 Q. Why not?

24 A. Because several days after I sent this email  
25 summarizing the terms the parties had agreed to, Mr. Escano

1 started backtracking from those terms.

2 Q. What do you mean by "backtracking"?

3 A. He didn't want to abide by the terms that the parties  
4 had reached anymore.

5 Q. Did he give a reason why he didn't want to agree to  
6 some of these terms that are reflected in your  
7 April 6<sup>th</sup> email?

8 A. When we subsequently discussed the issue, he didn't  
9 really give a reason other than, "I made a mistake and I  
10 don't want to agree to those terms anymore." And then he  
11 had specific reasons for why he wanted changes for the terms  
12 he was backtracking on.

13 Q. What you describe as this "backtracking," how did  
14 Mr. Escano communicate that to you?

15 A. By email and on the phone.

16 Q. Are any of the emails that you just made reference to  
17 included within Defendants' Exhibit 3?

18 A. They are. So, for example, there's the April 9 email  
19 where Mr. Escano requested changes to the release terms and  
20 stated that he cannot do a general release, even though we  
21 had agreed to that. There's also the April 10 email in  
22 which Mr. Escano said also, "I cannot do a non-disparagement  
23 clause."

24 Q. Mr. Terepka, how did the defendants respond to these,  
25 for lack of a better word, "changes" that Mr. Escano was

1 asking for?

2 A. So there's two pieces to that. The defendants  
3 responded in an April 14 email in Exhibit 3 that summarized  
4 our discussion of the terms that Mr. Escano wanted to  
5 change. And then ultimately, what defendants did in  
6 response to Mr. Escano's requested changes to the terms is  
7 they accommodated Mr. Escano in the interest of compromise  
8 and avoiding unnecessary disputes.

9 Q. Now, in addition to the changes we just talked about,  
10 were there any other requests that Mr. Escano made in the  
11 course of the negotiations prior to the signing of the final  
12 agreement?

13 A. The other request was that Mr. Escano took the  
14 position that he would not provide an IRS Form W-9.

15 Q. What is an IRS Form W-9, as you understand it?

16 A. IRS Form W-9 is an IRS required form for payees of  
17 nonemployee payments to complete to certify information like  
18 their name, address, and taxpayer identification number that  
19 payors of nonemployee payments are required to obtain in  
20 connection with paying a nonemployee.

21 Q. Well, when Mr. Escano told you that he didn't want to  
22 provide a W-9, how did you respond to that?

23 A. I responded to that by asking him to reconsider and  
24 informing him that -- he said he didn't want to provide one  
25 because his taxpayer identification number would be his

1 social security number. And response to that was, "Well,  
2 please reconsider because the IRS Form W-9 is a standard and  
3 confidential part of the settlement process," and that he  
4 could also consider alternatives, like retaining a law firm  
5 for the purpose of accepting the settlement payment so that  
6 the law firm could provide a W-9 with a taxpayer  
7 identification number that was different than his social  
8 security number; or, if he had a business, that he could  
9 potentially provide a W-9 from the business that also  
10 wouldn't be his social security number. So that piece is  
11 discussed in the April 14 email in Exhibit 3, the second  
12 paragraph.

13 Q. Now, how did Mr. Escano respond to these alternatives  
14 that you offered him?

15 A. He didn't. He just said, "I cannot provide a W-9."

16 Q. Well, what happened next, after Mr. Escano, for lack  
17 of a better word, "declined" your alternatives? What  
18 happens next?

19 A. After that, informed him that defendants could pay the  
20 settlement amount without a W-9.

21 Q. Is that reflected also in Defendants' Exhibit 3?

22 A. It is. It is reflected in my April 25<sup>th</sup> email to  
23 Mr. Escano.

24 Q. And just to be clear, it looks like that was an email  
25 sent April 25<sup>th</sup> at 9:19 A.M.; is that right?

1 A. Yes.

2 Q. All right. Thank you.

3 Now, in that email, it looks like you write  
4 (reading), "I'm writing to let you know that my client can  
5 pay the settlement amount without a W-9." What did you mean  
6 by that, precisely?

7 A. I meant that we'd asked several times for a W-9. It  
8 was very clear he wasn't going to provide one and that the  
9 settlement could move forward based on -- despite his  
10 refusal.

11 Q. Going back briefly to Defendants' Exhibit 3, did  
12 Mr. Escano respond to your April 25<sup>th</sup> email?

13 A. He did. He responded and said, "Good to hear" and  
14 that he would anticipate a proposed contract.

15 Q. Do you recall Mr. Escano asking you any questions  
16 about the substance of your April 25<sup>th</sup> email?

17 A. No.

18 Q. Well, what happens next, after this email exchange  
19 about the W-9? What's the next step?

20 A. The next step is defendants proposed a settlement  
21 contract. And the parties turned drafts of that until the  
22 parties were satisfied with the agreement and then they  
23 executed it.

24 Q. I'd like to show you what's been marked as Defendants'  
25 Exhibit 31.

1                   Mr. Terepka, do you recognize Defendants' Exhibit  
2   31?

3       A.    I do. This is a copy of an email that I sent to  
4   Mr. Escano on April 28<sup>th</sup>, attaching the first draft of the  
5   settlement.

6       Q.    And just so we're clear, it looks like Exhibit 31 is  
7   made up of several emails and then there is a Word document  
8   at the end of the exhibit. Can you point us exactly to the  
9   draft contract or is that the Word document?

10      A.    It is. It's the six-page document at the back of the  
11   exhibit, Defendants' 31.

12      Q.    I'd like to next show you Defendants' Exhibit 32. And  
13   if I could ask you one more clarifying question about  
14   Defendants' Exhibit 31 before we move off of that: Was that  
15   the first draft of the settlement agreement that was  
16   exchanged between you and Mr. Escano?

17      A.    Yes.

18      Q.    Okay. Turning to Defendants' Exhibit 32, are you  
19   familiar with that?

20      A.    Yes.

21      Q.    And could you describe what it is, please.

22      A.    This is a copy of an email I received from Mr. Escano  
23   attaching his redline changes he proposed to the settlement  
24   contract I sent him.

25      Q.    Now, are the redline changes reflected in a Word

1 document at the end of this exhibit?

2 A. They are. They're reflected in pink.

3 Q. Now, as I look at the Word document that is at the end  
4 of Exhibit 32, I see there is some text in pink. Do you see  
5 that?

6 A. Yes. The text in pink reflects the tracked changes  
7 Mr. Escano prosed.

8 Q. Just so I understand, when you say "tracked changes,"  
9 what exactly is that?

10 A. That's a function in Word that tracks edits in a Word  
11 document, so that, in a process like this, one side can see  
12 the changes that someone has proposed and consider them.

13 Q. Looking at the redline that's attached to Exhibit 32,  
14 did Mr. Escano propose any revisions to Section 5 of the  
15 agreement, which, as we reviewed earlier, relates to tax  
16 liability?

17 A. He did not.

18 Q. Did Mr. Escano ask for any changes to be made that  
19 related to the Form W-9 that we discussed earlier?

20 A. No.

21 Q. I think we might -- I hope we discussed earlier in the  
22 context of a W-9 a concept called "backup withholding." Are  
23 you familiar with that concept?

24 A. I am.

25 Q. Could you briefly describe what that is? And I hope

1 we didn't trod this ground earlier.

2 A. I don't recall that we did.

3 Q. Okay.

4 A. In any event, "withholding" is a concept that we're  
5 all familiar with most commonly in the employer paycheck  
6 situation because employers withhold taxes from employee  
7 paychecks and pay them to the Federal Government, because  
8 the IRS requires it. In the nonemployee context in  
9 connection with a Form W-9, the IRS requires that if someone  
10 declines to provide a W-9 or gives incorrect information  
11 that the party paying the nonemployee withhold what's called  
12 a "backup withholding" to ensure that the nonemployee  
13 receiving the payment pays their taxes.

14 Q. Now, in the redlined changes that are a part of  
15 Exhibit 32, did Mr. Escano propose any changes relating to  
16 the concept of backup withholding?

17 A. No.

18 Q. We talked earlier about Section 18 in the final  
19 agreement and the attorney-fee-shifting provision. Is there  
20 something to the same effect in this draft of the agreement  
21 we see in Exhibit 32?

22 A. Yes. In Section 17, there's the same language.

23 Q. Now, did Mr. Escano propose any changes to that  
24 language in this draft agreement?

25 A. He did not.



1 Q. Did Mr. Escano, during the course of negotiations,  
2 ever ask you any questions about the attorney-fee provision?

3 A. No.

4 Q. Did he ever indicate to you in any way that he  
5 objected to including a fee-shifting provision in the  
6 agreement?

7 A. No. On the contrary. By not proposing any changes to  
8 it, I thought he accepted it.

9 Q. Let me show you what's been marked as Defense  
10 Exhibit 33.

11 THE COURT: Just to point something out, the  
12 attorney's fee provision in Exhibit 32 is paragraph --

13 THE WITNESS: 17.

14 THE COURT: -- 17, whereas, in the executed  
15 agreement, which is Defendants' Exhibit 1, it is  
16 paragraph 18, yes?

17 THE WITNESS: That's correct, Your Honor. And I  
18 believe the reason for that is the paragraph numbering  
19 changed in Mr. Escano's draft because he had deleted a  
20 paragraph. And I believe we'll see in the next draft that a  
21 paragraph was added back. And, in what is in Exhibit 32,  
22 paragraph 17 became, in the final, paragraph 18.

23 Q. (BY MR. MEADOWS): Thank you, Mr. Terepka.  
24 Actually, before we move off of 32 -- I guess I  
25 accidentally skipped over this -- do you see, within

1 the Word document that's at the end of this exhibit,  
2 there are some boxes offset to the right that say  
3 "deleted"?

4 A. On which page?

5 Q. I see one on page 4 of 6 of the Word document; 3 of 6;  
6 2 of 6.

7 A. Yes.

8 Q. Can you describe what those boxes indicate?

9 A. Those indicate language that Mr. Escano proposed  
10 deleting in this redline.

11 Q. One moment, please.

12 All right. Sorry for the juggling, but if we can  
13 please go back to Defense Exhibit 33, which I just handed up  
14 to you.

15 A. Yes. This is a May 3 email from me to Mr. Escano.  
16 And at the back of it is attached a six-page copy of the  
17 redline that I sent back to him with additional proposed  
18 changes and that had left or accepted many of Mr. Escano's  
19 proposed edits.

20 Q. And just so we're 100 percent clear on what we're  
21 seeing here in the Word document that's part of Exhibit 33,  
22 there's text in the color pink. What is that?

23 A. The text in the color pink are changes that Mr. Escano  
24 proposed and that defendants accepted in this draft.

25 Q. And I see some text that's in the color green. What's

1     that?

2     A.    Those are changes and additional language that -- or  
3     deletions that defendants proposed in this draft.

4     Q.    Again, I see some text boxes offset to the right.  
5     What are those?

6     A.    Those are indicating the deletions in the same  
7     color-coding, with green being defendants and pink being  
8     Mr. Escano's.

9     Q.    Now, does -- you may have testified to this already,  
10    but does Defense Exhibit 33 reflect that the defendants, in  
11    fact, accepted some of the changes to the settlement  
12    agreement that Mr. Escano had proposed?

13    A.    Yes.  They do.  All of the pink that was left were  
14    changes that Mr. Escano proposed and that defendants  
15    accepted.  For example, in Section 2, the payment,  
16    Mr. Escano changed the time for payment from 21  
17    business days to 14 business days, and defendants accepted  
18    that.  And there are other examples, including significant  
19    deletions on page 3.

20                 And then, to the Court's question about the  
21    numbering of the paragraphs, we can see, on page 4, the  
22    addition of paragraph 13, which is why the section about  
23    fee-shifting titled "binding effect" ultimately became  
24    Section 18 of the settlement.

25    Q.    I want to direct your attention to Section 21.  And,

1 again, we're still within Exhibit 33. It looks like there  
2 is some green language inserted there. What is that?

3 A. The green language there in Section 21 states that  
4 plaintiff has declined to consult with legal counsel.

5 Q. Did Mr. Escano object to that language being put into  
6 the agreement?

7 A. No.

8 Q. I want to ask you also, you'll see there's some bolded  
9 and capitalized language just above the signature blocks on  
10 page 6.

11 A. Yes.

12 Q. And is there some green language that's been inserted  
13 there as well?

14 A. Yes. The language there says "plaintiff affirms that  
15 he has had an opportunity to consult with an attorney prior  
16 to signing this agreement, but he has decided not to do so."

17 Q. Did Mr. Escano object to the inclusion of that  
18 language in the settlement agreement?

19 A. No.

20 Q. Now, we just reviewed three exhibits in a row where  
21 drafts were exchanged between the parties. Are there any  
22 other redline changes that were exchanged between you and  
23 Mr. Escano?

24 A. There are not.

25 Q. So after you sent the redline changes that appear in

1 Exhibit 3 to Mr. Escano, what happened?

2 A. After that, Mr. Escano sent back his signed copy. And  
3 then defendants sent back their signed copy. And the  
4 contract was fully executed.

5 Q. I'm going to show you what's been marked as Defense  
6 Exhibit 34.

7 THE COURT: It's actually been admitted, not just  
8 marked.

9 MR. MEADOWS: Oh, thank you, Your Honor.

10 Q. (BY MR. MEADOWS): Do you recognize Defendants'  
11 Exhibit 34, Mr. Terepka?

12 A. I do. This is an email from Mr. Escano to me,  
13 attaching the settlement agreement that he signed, after he  
14 incorporated the redline that we reviewed in Defendants'  
15 Exhibit 33.

16 Q. All right. Thank you.

17 Mr. Terepka, Mr. Escano contends in this case  
18 that, during the course of these negotiations that we've  
19 been reviewing, you hid the issue of backup withholding from  
20 him. Do you agree with that?

21 A. I do not.

22 Q. Why not?

23 A. I do not. I don't agree with that because it's an  
24 issue that we didn't discuss, but it's also an issue that  
25 really cannot be hidden because it's part of the tax law

1     that applies to everyone. In addition to that, we  
2     specifically discussed, on an April 12<sup>th</sup> call, the IRS  
3     Form W-9 and the instructions, which I referred Mr. Escano  
4     to in an effort to convince him, "Just take a look at the  
5     form; it's standard; please reconsider providing one." And  
6     the first page of that form warns that the failure to  
7     provide it will result in a backup -- or "may result," I  
8     believe, is the language, in a backup withholding. So it's  
9     not something we discussed, but it's not a secret and it  
10    wasn't hidden.

11    Q.   And just to be clear, any other reasons why you would  
12    disagree with the contention that you hid the backup  
13    withholding from him?

14    A.   There are a number of other reasons. So it's not --  
15    backup withholding is not a secret. It's not just on the  
16    Form W-9 we discussed, it's easily accessible in many other  
17    authorities, and it's as simple as Googling what happens if  
18    someone declines to provide a W-9. The first results will  
19    tell you.

20                There's other reasons: The settlement. Very  
21    clear, including Section 5, that plaintiff agrees defendants  
22    aren't making any representations about taxes and that  
23    plaintiff agrees whatever tax liabilities there may be come  
24    out of the settlement amount and not the defendants'  
25    pockets. So -- and on top of all that, I'm defendants'

1 lawyer and I owe a duty of loyalty to defendants, not  
2 Mr. Escano. I'm not Mr. Escano's lawyer. So I can't advise  
3 him, one way or the other, on anything.

4 And so, for those reasons, it's something that  
5 wasn't discussed, but it wasn't hidden. And, again, it's a  
6 tax law that applies to all taxpayers, so it cannot be  
7 hidden.

8 Q. Just to close the loop on the exchange of drafts here  
9 and the signatures, I want to show you what's been admitted  
10 as Defendants' Exhibit 35. Do you recognize Defendants'  
11 Exhibit 35?

12 A. Yes.

13 Q. And could you describe what that is?

14 A. This is a May 4 email from me to Mr. Escano attaching  
15 the fully executed settlement which is at the back of this  
16 document, the six pages in the back.

17 Q. Now, earlier in your testimony, we looked at Defense  
18 Exhibit 1, which was the final settlement agreement. Are  
19 there any differences between Defendants' Exhibit 1 and the  
20 agreement that we see in Defendants' Exhibit 35?

21 A. No. They are the same document.

22 Q. Mr. Terepka, now, after the settlement agreement was  
23 fully executed by all parties, did the defendants actually  
24 make a settlement payment to Mr. Escano?

25 A. They did.

1 Q. And I'm going to show you Defendants' Exhibit 2 in  
2 that regard.

3 Do you recognize Defendants' Exhibit 2?

4 A. I do.

5 Q. And could you tell the Court what it is, please?

6 A. This is a copy of the settlement check the defendants  
7 sent Mr. Escano.

8 Q. And could you just describe how it is that you're  
9 familiar with what this is?

10 A. I'm familiar with what this is as part of facilitating  
11 the payment from defendants to Mr. Escano as part of the  
12 settlement.

13 Q. Now, without reciting any specific numbers, is it the  
14 case that the amount of the check in Exhibit 2 is less than  
15 the number that's included in the settlement agreement  
16 itself?

17 A. Yes, it is.

18 Q. Why is that the case?

19 A. The reason for that is because Mr. Escano declined to  
20 provide a Form IRS W-9; Federal tax law required Defendants  
21 to withhold from this amount a 24 percent backup  
22 withholding.

23 Q. Now, did you let Mr. Escano know that the 24 percent  
24 backup withholding was going to happen?

25 A. In connection with sending the settlement check, we



1 sent Mr. Escano a letter explaining the backup withholding  
2 and why it was required under Federal law.

3 Q. I'm going to hand you what's been admitted as  
4 Defendants' Exhibit 5.

5 Do you recognize Defendants' Exhibit 5?

6 A. Yes.

7 Q. And what is it?

8 A. This is a May 12 letter that I e-mailed Mr. Escano.

9 Q. Why did you send this letter to Mr. Escano on  
10 May 12<sup>th</sup>?

11 A. To ensure that he understood the reason for the  
12 withholding from the settlement payment when he received the  
13 check.

14 Q. Now, would you please read the second paragraph of  
15 your letter, beginning with "During settlement  
16 negotiations," that sentence and the following one.

17 A. (Reading) "During settlement negotiations, defendants  
18 repeatedly requested that you provide them with a copy of  
19 your W-9 to facilitate payment. You declined to provide  
20 one."

21 Q. Were those statements true when you sent this letter  
22 to Mr. Escano?

23 A. Yes.

24 Q. Now, the next sentence, would you please read that,  
25 starting with "because of that."

1       A.     (Reading) "Because of that, Federal law requires  
2       defendants to withhold 24 percent of the settlement funds  
3       and pay that as a backup withholding to the IRS."

4       Q.     Mr. Terepka, what was your basis for asserting in this  
5       letter that there was a 24 percent backup withholding  
6       required?

7       A.     Several authorities, including Title 26 of the United  
8       States Code that's cited in the letter, IRS guidance, and  
9       all sorts of authorities about this.

10      Q.     What happened after you sent this letter to Mr. Escano  
11      on May 12<sup>th</sup>?

12      A.     Shortly after I sent this letter, he called me.

13      Q.     Did you take the call?

14      A.     I did.

15      Q.     What did Mr. Escano say to you?

16      A.     Well, he seemed angry. He called and asked about the  
17      settlement check. And I explained to him, as we set forth  
18      in the letter, because he declined to provide a W-9, a  
19      backup withholding was required. And he just continued to  
20      be angry and ultimately raised his voice and kept repeating  
21      himself over and over, "What do you think someone will do  
22      who sues over telephone calls if you steal from them? What  
23      do you think they will do?" He repeated it at least six  
24      times, maybe more.

25      Q.     How did you take those statements by Mr. Escano?

1 A. I understood them to be a threat.

2 Q. Did you respond to him at all?

3 A. I did. I said something like, "You tell me. I don't  
4 know what you're going to do. What is it?" And he didn't  
5 answer that. I also asked him to consider the authorities  
6 we cited in the letter we sent him. And his response to  
7 that was, "I will not do that." I also asked him to send me  
8 authority that the backup withholding wasn't required by  
9 Federal law --

10 Q. Did he do that?

11 A. -- and he told me --

12 Q. I'm sorry.

13 A. -- "I will not do that."

14 Q. Now, if we look back at Defendants' Exhibit 3, which I  
15 hope you've still got in front of you, it's that series of  
16 emails between you and Mr. Escano that we reviewed earlier.  
17 And I want to ask you if, in that email string, there are  
18 any emails that relate to this telephone call that you  
19 describe with Mr. Escano on May 12<sup>th</sup>?

20 A. There are.

21 Q. So turning to the May 12<sup>th</sup> emails, there is a May 12  
22 email time-stamped 1:02 P.M., for example. Why did you send  
23 that May 12th, 1:02 P.M. email to Mr. Escano?

24 A. So it was an effort to avoid a dispute. And so I just  
25 kind of tuned out his yelling and tried to get back to him

1 in a way that would be productive and move things forward.  
2 So he asked on that call, "Go to your client and ask them to  
3 pay me the amount that was withheld from the settlement  
4 check." And you know, I told him I'd take that back to my  
5 client. And so that's what the first sentence is about.  
6 The second sentence is, "Well, ask him if he'd be willing to  
7 provide a W-9 so that defendants could send a new check  
8 without the withholding that apparently made him so angry."

9 Q. Is Mr. Escano's response reflected in this email  
10 string that's part of Exhibit 3?

11 A. It is. It's a May 12<sup>th</sup> email right above that.

12 Q. What does Mr. Escano say there?

13 A. He -- his response was (reading), "No W-9. I'm not  
14 doing extra steps."

15 Q. What did you understand him to mean when he said "I'm  
16 not doing extra steps"?

17 A. That he didn't want to complete the one-page form and  
18 send it so he could get the settlement amount without the  
19 backup withholding, consistent with Federal law.

20 Q. All right. Now, what happened next after Mr. Escano's  
21 response to you?

22 A. After that, I continued to send communications with  
23 him, including the May 15<sup>th</sup> email in this exhibit, asking  
24 him to reconsider, explaining that the withholding is  
25 required, explaining that there's IRS information that he

1     could get credit for the backup withholding on his taxes  
2     with a link to the IRS website. And ultimately the outcome  
3     of this was it was clear the defendants were going to need  
4     to move to enforce the settlement.

5     Q.    Let me ask you specifically, in your May 15<sup>th</sup> email  
6     to Mr. Escano, time-stamped at 9:31 A.M., the final sentence  
7     is (reading), "Please confirm that you will sign off on the  
8     dismissal and we'll prepare the stipulation for your  
9     review." What were you referring to specifically when you  
10    referred to "the dismissal" there?

11    A.    Referring there to the requirement in the settlement  
12    that Mr. Escano dismiss the case with prejudice, including  
13    by the Court's deadline to submit closing documents on  
14    May 15.

15    Q.    How did Mr. Escano respond to your request that he  
16    sign off on the dismissal?

17    A.    He rejected it and said the deal was off.

18    Q.    And is that reflected also in an email included in  
19    Exhibit 3?

20    A.    Yes. In the May 15 email with the time stamp  
21    12:25 P.M.

22    Q.    And in particular, is that in the final paragraph of  
23    Mr. Escano's May 15<sup>th</sup> email?

24    A.    Yes. The language "the deal is off" is in that  
25    paragraph.

1 Q. Now, once Mr. Escano had told you that, in his view,  
2 the deal was off, what did you decide to do?

3 A. At that point, continued to explain that the backup  
4 withholding was a requirement of Federal law and not a  
5 breach of the settlement and inform him that, if he  
6 continued not to cooperate with his obligations of the  
7 settlement, under the settlement, the defendants would move  
8 to enforce it.

9 Q. I'd like to show you a document that's been admitted  
10 as Defense Exhibit 6.

11 Are you familiar with defense Exhibit 6?

12 A. Yes. This is a letter that I e-mailed Mr. Escano on  
13 May 22.

14 Q. Why did you send this letter to him at this time?

15 A. This letter was another effort to persuade Mr. Escano  
16 that complying with Federal tax law wasn't a breach of the  
17 settlement and also informing him that, if he continued,  
18 defendants would have no choice but to move to enforce and  
19 that they would seek to obtain their fees under Section 18  
20 of the settlement when they did so.

21 Q. In particular, could I direct your attention to the  
22 fourth paragraph of your letter. It's at the bottom of the  
23 first page. And if I could ask you to read the two  
24 sentences, beginning with "unless you reconsider."

25 A. (Reading) "Unless you reconsider, defendants will have

1 no choice but to move to enforce the settlement agreement  
2 and dismiss the case. When they do so, they will seek their  
3 fees for the entirely unnecessary expense of enforcing the  
4 settlement."

5 Q. Why did you find it necessary to tell Mr. Escano that,  
6 if the defendants moved to enforce the settlement, they  
7 would seek their fees?

8 A. Because that is a contractual obligation in the  
9 settlement and it was part of the effort to try to avoid an  
10 unnecessary dispute.

11 Q. In your letter, in the sentences that you just read,  
12 it also says -- or calls the expense of enforcing the  
13 settlement "entirely unnecessary." Why did you call those  
14 potential expenses at that time "entirely unnecessary"?

15 A. Because the purpose of the settlement was to end the  
16 litigation, not to have more litigation. And so that's why.

17 Q. Now, the defendants did file a motion to enforce the  
18 settlement --

19 A. They did.

20 Q. -- right? Are the defendants seeking their fees in  
21 connection with that motion?

22 A. They are.

23 Q. I should -- their attorney's fees.

24 A. Yes.

25 Q. I'd like to show you what's been admitted as

1 Defendants' Exhibit 39.

2 Do you recognize Exhibit 39, Mr. Terepka?

3 A. I do.

4 Q. What is it?

5 A. This is a summary of the fees the defendants incurred  
6 from Mr. Escano's breach of the settlement, the amount of  
7 those fees, and what those fees were for in each month.

8 Q. And it looks like there's a total amount in the bottom  
9 right-hand corner of the second page. Could you tell us  
10 what that is and what that is intended to reflect?

11 A. The total amount on the bottom of the second page is  
12 the amount of fees the defendants have incurred since the  
13 breach of the settlement through -- from May 12<sup>th</sup> through  
14 August 2023, with the fees for this month, September,  
15 forthcoming.

16 Q. Why are the fees for this month still forthcoming?

17 A. Because we're still in the month of September and the  
18 bills for that month have not been prepared yet.

19 Q. When will those bills be prepared?

20 A. Shortly after the end of this month.

21 Q. Now, you indicated that kind of the tally of these  
22 fees starts on May 12<sup>th</sup>. Why is that the start date?

23 A. That's the start date because that's the date where it  
24 became clear that Mr. Escano was not going to comply with  
25 the settlement; in particular, the phone call where he



1     called me and yelled at me. So I felt that we should  
2     continue to try to persuade him, but that it was not a  
3     likely result, given the tone of that call, and -- which was  
4     just surprising because, I mean, frankly, I thought he knew  
5     that -- about the backup withholding issue including because  
6     he told me he'd settled many cases without a W-9, in which  
7     case he would have experienced the backup withholding  
8     already.

9     Q. We'll talk about this in more detail as we go through  
10    this document but, at a high level, Mr. Terepka -- actually,  
11    let me back up and ask you a prefacing question. Who  
12    prepared Exhibit 39?

13    A. I did.

14    Q. Now, how did you go about doing that?

15    A. I went about doing that by reviewing the bills that my  
16    law firm and our local counsel, Atkinson, Baker & Rodriguez,  
17    had prepared in connection with this matter for  
18    those months. In addition to that, I've reviewed other  
19    documents related to the case, including filings,  
20    correspondence, et cetera, so that I could prepare a summary  
21    of what defendants were responding to in each month after  
22    the breach of the settlement.

23    Q. All right. I'm going to show you what's been admitted  
24    as Defendants' Exhibit 37.

25                   Do you recognize Exhibit 37?

1       A.    I do.  This is -- this exhibit has the bills that our  
2       local counsel prepared for this matter for the months of  
3       May, June, July, and August of this year.

4       Q.    And that's the Atkinson, Baker & Rodriguez firm in  
5       Albuquerque?

6       A.    It is.

7       Q.    Now, how is it that you've become familiar with  
8       invoices generated by the Atkinson Baker firm?

9       A.    They've sent them to me in connection with this  
10      matter; as all local counsels do, in my experience.

11      Q.    Did you review these invoices that are all a part of  
12      Exhibit 37 in preparing this summary that's included in  
13      Exhibit 39?

14      A.    Yes.

15      Q.    Now, looking at the invoices from the Atkinson, Baker  
16      & Rodriguez firm in Exhibit 37, what is the basis on which  
17      the Atkinson Baker firm prices and bills for its services?

18      A.    They bill hourly at an hourly rate.  And the billings  
19      reflect a kind of high-level summary of what they were  
20      working on when they incurred.

21      Q.    Wait -- oh, I'm sorry.  When you reviewed these  
22      invoices as they were issued to you over the course of the  
23      case, did you regard them as reasonable?

24      A.    I did.  The Atkinson Baker firm worked very  
25      efficiently and incurred very few hours in their role as

1 local counsel, which was to, since we're national TCPA  
2 defense counsel, help us ensure that our filings and  
3 practicing were consistent with the rules and practice of  
4 this jurisdiction.

5 Q. Let me also show you what's been admitted as Defense  
6 Exhibit 38.

7 I'm sorry to do this. Let me jump back very  
8 briefly before we start on 38. On the first page of Exhibit  
9 37, Mr. Terepka, there's some information there that looks  
10 like it has been blacked out. Why is that?

11 A. Those are redactions of time entries from before  
12 May 12 -- excuse me, May 12<sup>th</sup>. And defendants aren't  
13 seeking those fees, so they're removed from the invoices for  
14 that reason.

15 Q. Thank you. Back to Exhibit 38. And let me ask you,  
16 do you recognize that?

17 A. Yes.

18 Q. And what is it?

19 A. Exhibit 38 has the invoices that my law firm prepared  
20 for the months of May, June, July, and August of this year.

21 Q. Did you have any role in preparing the invoices that  
22 we see in Exhibit 38?

23 A. Yes, I prepared them myself.

24 Q. All right. And are these invoices something that you  
25 reviewed before they were sent to your client for payment?

1 A. Yes.

2 Q. Similar to the question I asked you a moment ago,  
3 there are -- on the first three pages of Exhibit 38, there's  
4 a variety of information that's blacked out. Why is that?

5 A. Same reason. Those are entries for time before  
6 May 12<sup>th</sup>, and defendants aren't seeking those fees.

7 Q. As reflected in Exhibit 38, what is the basis on which  
8 the Watstein Terepka prices and bills for its services?

9 A. So like any service, there's really three main factors  
10 that go into the rate. It's what we do, our skill and  
11 experience in what we do, and the market for what we do.

12 Q. Before you get into that, let me ask you a much more  
13 simple question: Is this an hourly billing rate or some  
14 other fee arrangement reflected in these statements?

15 A. Understood. It's an hourly arrangement, same as the  
16 Atkinson, Baker & Rodriguez firm.

17 Q. We'll come back to the rate issue, but I want to ask  
18 you -- and we'll get into it in a little bit more detail --  
19 as you were helping to prepare these invoices and reviewing  
20 them at the time they were issued, did you think the charges  
21 reflected in them were reasonable?

22 A. Yes. So we tried to work as efficiently as possible  
23 on this matter, including, for instance, by staffing one  
24 partner and one associate as the main timekeepers to handle  
25 as much as possible.

1 Q. We'll get into a little bit more about the rates now.  
2 And if you would flip back to Exhibit 39, your summary.

3 A. Okay.

4 Q. And we hadn't talked about this part yet, but on the  
5 final page of Exhibit 39, I see what looks like a chart.

6 A. Yes.

7 Q. And it's got column for timekeeper, a column for  
8 hourly billing rate, and a column for number of hours  
9 billed. What is that chart intended to reflect?

10 A. This chart reflects the timekeepers that billed on  
11 this matter from May 12<sup>th</sup> and after, their hourly billing  
12 rate, and the number of hours that they billed with a total  
13 amount of hours summarized at the bottom.

14 Q. All right. Now, of these -- of the individuals listed  
15 here on the final page of Exhibit 39, which are employed by  
16 the Atkinson firm?

17 A. Clifford Atkinson, Douglas Baker, Owen Barcala,  
18 Charlotte Greenlee.

19 Q. Is it your understanding that Ms. Greenlee is a  
20 paralegal?

21 A. It is.

22 Q. Now, is there an hourly billing rate that corresponds  
23 to each of those individuals you just identified?

24 A. There is.

25 Q. What's the source of that hourly billing rate as it's

1 reflected in the charts?

2 A. The bills we looked at earlier in Exhibits 37 and 38.

3 Q. Did you develop an opinion as to whether those hourly  
4 rates are reasonable?

5 A. Yes.

6 Q. And what was your conclusion?

7 A. That they are.

8 Q. Why did you -- what's your basis for that?

9 A. The basis for that are those three factors I referred  
10 to earlier. So for each firm, for us as lead counsel, as  
11 national TCPA defense counsel, it's what we do, our skill  
12 and experience in what we do, and the market for that. And  
13 then, for the Atkinson Baker firm, local counsel rates, same  
14 three factors.

15 Q. Now, other than the four individuals you identified as  
16 being employees of the Atkinson Baker firm, are all of the  
17 rest of the individuals listed in this chart on Exhibit 39  
18 affiliated with Watstein Terepka?

19 A. Yes.

20 Q. Now, how are the rates for the Watstein Terepka  
21 attorneys and other personnel determined?

22 A. So starting with factor one: What we do. We are  
23 national TCPA defense counsel and other consumer claim  
24 defense counsel. That is a high-exposure, specialized field  
25 because, just sticking with the TCPA, for example, it's a

1 Federal law that provides substantial statutory damages for  
2 something as simple as a phone call or a text message. So  
3 it's a high-exposure area. It is -- this case is, frankly,  
4 a good example of that. Mr. Escano claimed that, based on  
5 19 phone calls, he was entitled to hundreds of thousands of  
6 dollars. And that puts a finer point on the high-exposure  
7 nature of this type of work, and that's what we do.

8 It's also an area of the law that's constantly  
9 evolving, which makes it interesting, but also difficult.  
10 There has been a number of Supreme Court decisions in just  
11 the past few years about the TCPA, including the *Facebook*  
12 *versus Duguid* decision and, before that, *AEPC versus Barr*.  
13 Particularly in the AEPC case, there wasn't really a  
14 decision from the Supreme Court, it was a bunch of  
15 conflicting concurrences and there's been a ton of  
16 litigation about what it means ever since.

17 In any event, it's a specialized area,  
18 high-exposure area, and evolving area of law. And it's a  
19 national practice because it's a Federal law, so this is  
20 TCPA litigation in practically every district in the  
21 country. Our law firm has, therefore, as national defense  
22 counsel, appeared in dozens of districts. Me, personally,  
23 I've appeared in many districts across the country:  
24 Southern District of Florida, Eastern District of New York,  
25 Central District of California, Northern District of

1 California, Western District of Washington, District of  
2 Kansas -- I could go on and, of course, the District of New  
3 Mexico. The point is what we do is a national specialized  
4 practice.

5 Q. Has your firm received any external recognition for  
6 its TCPA practice?

7 A. It has. And that really goes to the skill and  
8 experience in what we do. So our firm has defended -- the  
9 lawyers at our firm have defended hundreds of TCPA matters,  
10 including many against pro se serial TCPA litigants. And  
11 we've been recognized for that. In fact, I think our group  
12 of lawyers is among the most experienced in this area in the  
13 country.

14 One of the recognitions of which we are most  
15 proud is our ranking in Chambers and Partners, which is a  
16 ranking organization and a really premiere one for law  
17 firms. So all of the national and global law firms --  
18 Kirkland & Ellis, Skadden, Cravath, Quinn, Latham -- all of  
19 them vie for Chambers and Partners rankings. And the  
20 highest ranking they can get which is Band 1. Our law firm,  
21 our small law firm, is recognized by Chambers and Partners  
22 as a Band 1, the highest ranking in TCPA litigation,  
23 specifically.

24 Q. Mr. Terepka, have you made any efforts to compare your  
25 firm's hourly rates with those charged by other firms that



1 have national TCPA practices?

2 A. Yes. And that's factor three, the market. So because  
3 of the national and specialized nature of the work, most  
4 TCPA defense practices are at national and often global law  
5 firms that command some of the highest rates in the country,  
6 firms like Holland & Knight, Squire, Patton, Boggs, K&L  
7 Gates, many others. Those types of firms have hundreds, if  
8 not thousands, of lawyers, offices all over the country.  
9 And their rates can be as high as \$1,000 an hour or more.

10 So to take one example that I believe is included  
11 as Exhibit 40, is the *D'Ottavio versus Slack* case. That is  
12 a TCPA matter that the law firm Holland & Knight handled in  
13 the -- another district. And that decision reflects that  
14 the lead partner for defense in that case had a market rate  
15 of \$976 an hour. My rate is more than \$300 an hour less  
16 than that. And the Court ultimately awarded a rate of \$837  
17 per hour. And my rate is more than \$200 an hour less than  
18 that. Why are our rates lower? The answer to that is we're  
19 a small boutique firm of about ten lawyers, and yet we do  
20 this national practice. And because we're a small boutique  
21 law firm, we can offer rates that are a bargain for this  
22 type of work, much lower than the typical national global  
23 massive law firms that are charging, frankly, astronomical  
24 rates.

25 Q. Looking back at the chart --

1 THE COURT: Mr. Meadows, how long is the direct  
2 going to be before you pass the witness?

3 MR. MEADOWS: Maybe another 15 minutes or so,  
4 Your Honor. That's my best estimate.

5 THE COURT: We're taking a break in five minutes.

6 MR. MEADOWS: Yes, sir.

7 THE COURT: And I've heard enough about the firm  
8 and how it comes up with its rates. Let's move on. There's  
9 no jury here.

10 MR. MEADOWS: Understood, Your Honor.

11 Q. (BY MR. MEADOWS): Let's talk about, other than  
12 the rates, the activities that led to the fees that  
13 are at issue here, Mr. Terepka.

14 Again, your total through August is \$163,618.01.  
15 That's an awful lot of money. How did it come to be,  
16 between the two firms representing the defendants, you  
17 charged that much?

18 A. That came to be because, in addition to moving to  
19 enforce the settlement, which is a substantial, substantive  
20 motion that required a lot of research and evidence,  
21 defendants were forced to respond to constant additional  
22 tactics from plaintiff that imposed substantial additional  
23 fees.

24 Q. If I could circle back for one moment -- and, Your  
25 Honor, I understood what you said, but I do think it's

1 important to get this out -- I just want to ask you if  
2 you've compared your firm's rates to the District of New  
3 Mexico?

4 A. Yes.

5 Q. And what did you find there?

6 A. What I found there is that our rates, as a national  
7 TCPA defense firm, are higher, but also that there is no  
8 national TCPA defense practice that I could identify in the  
9 state of New Mexico.

10 Q. How did you come to that conclusion?

11 A. By asking local counsel if they knew of anyone. And  
12 researching online. And, just to move things along,  
13 example, Googled "TCPA defense lawyer New Mexico," the first  
14 result's a California firm.

15 Q. Moving back to the chart, Exhibit 39, it looks like  
16 for the month of May, the defendants were charged just over  
17 \$55,000 for the services that are described here. Again, at  
18 a high level, could you tell the Court how it was that the  
19 fees added up to so much?

20 A. So that month, one of the key items was preparing the  
21 motion to enforce, all the supporting research and evidence;  
22 in addition to that, responding to plaintiff's various  
23 unnecessary tactics, like requests to open discovery, a  
24 request for clerk's default that Mr. Escano filed on the --  
25 late in the day the Friday before Memorial Day. So those

1 are some examples.

2 Q. And, again, just to move through this briefly, at a  
3 high level for June, we've got just over \$52,000 in fees.  
4 How did it come to be that the defendants charged that?

5 A. So those fees relate to preparing a reply in support  
6 of the motion to enforce the settlement, which was a  
7 substantial undertaking, given the sheer number of the  
8 arguments that Mr. Escano raised in response; finalizing the  
9 motion to enforce, which we filed on June 1; and responding  
10 to other unnecessary imposition of costs, including a  
11 cross-motion to void the settlement, even though the motion  
12 to enforce would decide whether the settlement was  
13 enforceable; and other things, like Mr. Escano's threat  
14 which he sent to me at 7:00 P.M. on a Friday to personally  
15 sue me, local counsel, and our law firms unless defendants  
16 withdraw the motion to enforce, raising arguments like it  
17 needs to be withdrawn because he's not a payee.

18 Q. It looks like the monthly amounts for July and August  
19 decrease pretty substantially, but were both over \$27,000  
20 for each of those months. Can you give us a high-level  
21 summary of what was going on at that time that caused those  
22 bills to be incurred.

23 A. So, very briefly, in July, it was responding to the  
24 motion to void, ancillary filings like a motion to seal,  
25 continued requests to open discovery, including Mr. Escano

1     responding to his own emails in an apparent effort to create  
2     a record that was not true that defendants weren't  
3     responding to him, and other communications from plaintiff.  
4     And it got to the point that defendants just informed  
5     Mr. Escano they weren't going to respond to him anymore  
6     because they didn't want to incur any more fees.

7             THE COURT:  It's 10:30 on the clock on the wall  
8     behind us, so we will resume in -- I'm just looking to  
9     Vanessa.  Ten minutes, nod; 15 minutes, nod?  Ten?

10            All right.  Ten minutes.  We'll resume at 10:40.

11                    (A recess was taken.)

12            All right.  We're back on the record.

13            Mr. Meadows, you may continue.

14            MR. MEADOWS:  Thank you, Your Honor.

15     Q.  (BY MR. MEADOWS):  Mr. Terepka, I really only  
16     have a few more questions for you.  I think where we  
17     left off before the break was, I was asking you if  
18     you could explain at a high level what the drivers  
19     were of the August fees that are reflected on  
20     Exhibit 39.

21     A.  Yes.  So the August fees was -- the August fees were  
22     to -- again, preparing for the hearing the Court set and  
23     also to respond to discovery requests that plaintiff served  
24     after the Court set a hearing that, apparently, sought  
25     information before the deadlines the Court set in its order.

1 Q. Moving on briefly to September, which we talked about  
2 earlier, the fees are forthcoming. But as we sit here  
3 today, do you at least have an estimate of what those are  
4 going to look like?

5 A. They're significant and well in excess of \$60,000.

6 Q. What's the driver there?

7 A. The driver of that is primarily all the preparation  
8 for this hearing.

9 Q. Thank you. Mr. Terepka.

10 MR. MEADOWS: No further questions.

11 THE COURT: Mr. Escano, you may cross-examine the  
12 witness.

13 MR. ESCANO: I did bring two exhibit binders, but  
14 I didn't have an opportunity to --

15 (Discussion off the record.)

16 And, Your Honor, just so I'm clear with the  
17 cross-examination, will this be my only opportunity to ask  
18 him questions?

19 THE COURT: No, because you've identified him as  
20 a witness in your case in chief. I'm wondering, though --  
21 we have two options: I can let you ask -- I can let you  
22 cross-examine him as a defense witness; I can also allow  
23 you, at the same time, to examine him as if you were doing a  
24 direct examination in your own case in chief. We can do all  
25 of that at once. If you'd rather, you can just do a

1 cross-examination and then wait and recall Mr. Terepka in  
2 your case. Do you have a preference? Would you like do it  
3 all at once?

4 MR. ESCANO: I can do it all at once.

5 THE COURT: Mr. Meadows, is that all right with  
6 you?

7 MR. MEADOWS: That's fine with us, Your Honor.

8 THE COURT: Let's do that.

9 **CROSS-EXAMINATION**

10 Q. (BY MR. ESCANO): Good morning, Mr. Terepka.

11 A. Good morning.

12 Q. Do you have Defendants' Exhibit 34 in front of you?

13 A. Let me look.

14 Q. Let's turn to that one.

15 A. Yes.

16 Q. Let's turn to page 13 of 18.

17 A. Yes.

18 Q. Okay. So this is an April 6, 2023, email from you.  
19 This is following our phone call, a phone call we had,  
20 right?

21 A. Yes, on April 5<sup>th</sup>.

22 Q. In this email, it appears you're summarizing our phone  
23 call and an agreement we reached during our phone call?

24 A. Yes.

25 Q. Okay. You believed we had an agreement?

1 A. Yes.

2 Q. Did we have an enforceable agreement?

3 A. On the April 5<sup>th</sup> call, we did have an enforceable  
4 agreement, but we subsequently changed the terms of that.

5 Q. Prior to this email, did I ever see anything in  
6 writing regarding the terms we had discussed during that  
7 phone call?

8 A. I don't know what you saw in writing. What I do know  
9 is that we discussed the IRS Form W-9 and the instructions  
10 to it.

11 Q. And what did I say -- well, why did we discuss the  
12 Form W-9?

13 A. Because you refused to provide one, and defendants  
14 continued to request one.

15 Q. When you say I refused to provide a W-9, are you  
16 referring to -- what do you mean by that?

17 A. I mean that, when defendants asked you for one and  
18 asked you to reconsider providing one, you declined to.

19 Q. The defendants asked me for a W-9?

20 A. They did, including as reflected in the email thread  
21 in this exhibit.

22 Q. Did they ask me for a W-9 before or after I brought up  
23 the issue of a W-9?

24 A. They asked you --

25 Q. Sorry to cut you off. This is a conversation that we



1 had and we were discussing the W-9, correct?

2 A. Which conversation are you referring -- so this is my  
3 recollection: On April 5<sup>th</sup>, on that phone call, you first  
4 raised the issue of the W-9 and you said you didn't want to  
5 provide one because your taxpayer identification number  
6 would be your social security number. In response to that,  
7 I asked you to reconsider providing one because it's a  
8 standard part of the settlement process, it's confidential,  
9 et cetera. And in addition to that phone call, it's  
10 reflected in the email thread. And your response to that  
11 was, on April 14<sup>th</sup>, "I cannot provide a W-9."

12 Q. Okay. Just to be clear, we had not yet discussed --  
13 by April 6, we had not yet discussed the issue of a W-9,  
14 correct?

15 A. That is not correct. By April 6<sup>th</sup>, we had discussed  
16 it. And that's why the April 6<sup>th</sup> email -- excuse me. Let  
17 me look at the email thread. You're correct.  
18 April 12<sup>th</sup> was the phone call where you first said, no,  
19 you didn't want to provide a W-9 with your taxpayer  
20 identification number. April 5<sup>th</sup> was the phone call where  
21 we agreed on material terms, as summarized on the  
22 April 6<sup>th</sup> email.

23 Q. Okay. So the phone call that led to your  
24 April 6<sup>th</sup> email, did we discuss the W-9 or any tax issues  
25 during that phone call?

1 A. Not that I recall.

2 Q. Okay. And then we had a later phone call, which led  
3 to your email -- on page 9 of this exhibit, your email on  
4 April 14<sup>th</sup>.

5 A. Yes. That's the April 12<sup>th</sup> call.

6 Q. Okay. And during that call, we discussed the issue of  
7 a W-9?

8 A. Yes.

9 Q. Who brought up the issue of a W-9?

10 A. You brought it up and said you didn't want to provide  
11 one because your taxpayer identification number would be  
12 your social security number.

13 Q. And prior to that, we had no discussions about a W-9,  
14 correct?

15 A. That is correct.

16 Q. Okay. We're on the same page, page 9, same exhibit.  
17 I responded to your email on April 14<sup>th</sup> -- let's take a  
18 step back. Your April 14<sup>th</sup> email that we were just  
19 discussing, which goes over into page 10, you explain the  
20 W-9 form and that it is an IRS requirement; is that right?

21 A. Yes.

22 Q. Okay. And then I respond to your email on  
23 April 14<sup>th</sup> and I say, "I cannot provide a W-9"; is that  
24 correct?

25 A. That is correct.

1 Q. Okay. Do you also see where I offer to have the  
2 settlement agreement notarized and witnessed?

3 A. I do.

4 Q. And then, on April 25<sup>th</sup>, you respond via email on --  
5 page 8 we're on, you respond and say that your client can  
6 pay the settlement amount without a W-9; do you see that?

7 A. I do.

8 Q. And is that what you sent me?

9 A. It is.

10 Q. Did your client ever consider having the settlement  
11 agreement notarized and witnessed?

12 MR. MEADOWS: Objection, Your Honor, to the  
13 extent that it calls for speculation.

14 THE COURT: Overruled.

15 A. So I looked into if having a settlement agreement  
16 notarized and witnessed could be an alternative to a W-9 and  
17 I couldn't find anything about that. And I couldn't find  
18 any authority for that, anywhere, including on the Form W-9,  
19 which says, if the form isn't provided, a backup holding may  
20 be the result of. And so -- and you didn't provide any  
21 authority for it either except that you've done it before,  
22 so that was the extent of --

23 Q. Thank you. Thank you.

24 Did you ever discuss this issue of having the  
25 settlement agreement notarized and witnessed with your

1 clients? Either of your clients.

2 A. So I think that's privileged because it's asking for  
3 communications with clients. In any event, I don't  
4 remember.

5 Q. You don't recall?

6 A. I don't.

7 Q. Mr. Terepka, are you a tax attorney?

8 A. I am not.

9 Q. Do you specialize in tax law?

10 A. I do not.

11 Q. Okay. We're on the same page, page 8, where you say  
12 (reading), "Just to recap."

13 A. Page 8?

14 Q. Page 8, on Exhibit 34, Defendants' Exhibit 34.

15 A. Yes.

16 Q. And just to recap, you state (reading), "I'm writing  
17 to let you know my client can pay the settlement amount  
18 without a W-9." What did you mean by "settlement amount"?

19 A. I meant that the defendants could pay the settlement  
20 amount that we had agreed to without a W-9.

21 Q. When you used the words "settlement amount," you were  
22 referring to an amount of money, correct?

23 A. Of course.

24 Q. Were you referring to the sum certain in the  
25 settlement contract, or were you referring to the sum

1 certain minus 24 percent for backup withholding?

2 A. I'm referring to the amount in Section 2, subject to  
3 Federal tax requirements.

4 Q. I'll ask you again. Were you referring to the sum  
5 certain in the settlement contract or were you referring to  
6 the sum certain minus 24 percent for backup withholding?

7 A. The settlement amount is the sum in Section 2.

8 Q. So you're referring to the sum certain in the  
9 settlement contract?

10 A. Yes. That's the settlement amount that defendants  
11 paid, consistent with Federal tax law.

12 Q. When you use the term "settlement amount," how much  
13 money were you referring -- how much money were you  
14 communicating to me that would come to me?

15 THE COURT: I have a better idea: Why don't you,  
16 using the settlement agreement -- and you can use  
17 Plaintiff's Exhibit 1 or Defendants' Exhibit 1, it doesn't  
18 matter -- and just direct him to a paragraph and ask him if  
19 that's the amount he had -- he intended, and then nobody has  
20 to say the amount.

21 MR. ESCANO: Okay. So --

22 THE COURT: Will that help?

23 MR. ESCANO: -- are you just referring to the  
24 verboseness of "sum certain"?

25 THE COURT: No. I just don't want specific

1 amounts of money stated because she's got to write it down,  
2 if it is --

3 MR. ESCANO: Okay.

4 THE COURT: -- and we're trying to sanitize our  
5 record of that.

6 MR. ESCANO: I see, because I just asked him  
7 that. Okay. I understand.

8 THE COURT: Yes.

9 MR. ESCANO: I understand.

10 Q. (BY MR. ESCANO): Thank you, Your Honor.

11 THE COURT: Sure.

12 Q. (BY MR. ESCANO): When you use the term  
13 "settlement amount" on page 8, were you referring to  
14 the amount in Section 2 -- the amount of money that  
15 you were communicating to me that would come to me  
16 in this April 25<sup>th</sup> email, was that the amount of  
17 money listed in Section 2 of the contract or some  
18 other amount of money?

19 A. This settlement amount is the amount of money  
20 reflected in Section 2 of the settlement.

21 Q. When you sent that email, how much -- were you saying  
22 that that amount of money in Section 2 would come to me or  
23 would it be a different amount of money that would come to  
24 me?

25 A. I was saying that defendants could pay the settlement

1 amount in Section 2 without a W-9.

2 Q. Pay to whom?

3 A. Pay to you, subject to Federal law that requires a  
4 withholding, no different than an employer withholding from  
5 a paycheck.

6 Q. Did you believe that I understood that word, that term  
7 you used to mean what you just said?

8 A. I don't know what you understood. What I know is that  
9 we discussed the W-9 and its instructions which discuss the  
10 concept of backup withholding. I don't know if you read it  
11 after we discussed it and I asked you to take a look. I  
12 don't know what other research you might have done about the  
13 conventions of not paying W-9, so I don't know what you  
14 understood.

15 Q. You're an attorney, correct?

16 A. I am.

17 Q. And, as an attorney, you get paid to make sure you're  
18 getting your point across, don't you?

19 A. I don't really understand the question. Sometimes.  
20 Sometimes I just get paid to sit and think about things.

21 Q. But when you're making a point, when you're having  
22 communications with someone else, you're careful with your  
23 words, aren't you?

24 A. I am.

25 Q. And when you communicate with someone, you have an

1 idea whether it's wrong or right, but you have an idea what  
2 your communications -- the impact your communications have  
3 on the person you're communicating with; is that correct?

4 A. I think so, yes.

5 Q. Okay. So isn't it important to you to understand what  
6 the person you're -- what the person your communicating with  
7 understands your communications to mean?

8 A. I don't really understand the question. The purpose  
9 of this email was to answer your question if defendants  
10 could proceed without a W-9.

11 Q. I'm not talking about the email; I'm just talking  
12 generally speaking. As an attorney, what you are doing --  
13 and our communications were in your professional capacity as  
14 an attorney, it's -- isn't it important to you that you  
15 understand what the other side means by your communications?

16 A. I don't understand your question. It's important to  
17 me to answer questions that people ask, like what you asked.  
18 And I answered your question.

19 Q. But you don't care what the other side thinks about  
20 your communications, their impression that they have?

21 A. I can't anticipate every impression that someone may  
22 have. I don't understand --

23 Q. I'm not asking you to anticipate every impression.  
24 I'm just asking generally speaking. Are you concerned with  
25 what the other side thinks about your communications, how



1 they are interpreting your words?

2 A. Do I care how the other side interprets my words? Of  
3 course I do.

4 Q. Did you consider how I interpreted your April 25<sup>th</sup>  
5 email?

6 A. I would have expected that you would consider this an  
7 answer to your question. And, in fact, you put that in  
8 writing in the next email. (Reading) "Hi, Alex. Good to  
9 hear." It seemed to answer your question. So to your point  
10 about your impression of it, you seemed satisfied that it  
11 answered your question.

12 Q. But you didn't care how I thought the term "settlement  
13 amount" was used?

14 A. I did care, and I thought I'd answered your question.

15 Q. How did you -- we may be spinning around in circles  
16 here, but I'll try one more time. How did you interpret my  
17 understanding of the term "settlement amount"?

18 A. I don't know what your interpretation was. What I do  
19 know is the settlement's clear --

20 Q. That's good enough. Thanks. You didn't know what my  
21 interpretation was; is that right?

22 A. How could I?

23 Q. Okay.

24 A. I mean, all I knew was the language in the settlement,  
25 the multiple terms that are clear about this, language in

1 the W-9, other resources. I expected you to understand that  
2 stuff because you said you did in the settlement.

3 Q. But you just said you didn't know how I understood  
4 that term to mean. Is that correct?

5 A. I can't know your understanding about anything except  
6 what's in the documents.

7 Q. But you don't dispute that?

8 A. Dispute what?

9 Q. What you just said, that you don't understand -- you  
10 didn't know what I understood that word to mean; you didn't  
11 have a belief. Is that correct?

12 A. The Word "W-9"?

13 Q. No, "settlement amount."

14 A. I understood you to understand the settlement amount  
15 to be what's written in Section 2.

16 Q. You just -- you just said that you didn't know what I  
17 understood that word to mean?

18 A. I don't know how you understood Section 2. What I  
19 would expect is that you would expect to -- that you would  
20 understand that to be what Section 2 says and what other  
21 terms in the settlement say.

22 Q. But you didn't know --

23 THE COURT: I think we've pretty well beaten this  
24 one to death. Maybe we can move on.

25 MR. ESCANO: Okay. We will.

1                   So I'm going to offer the witness Plaintiff's  
2   Exhibit 2.

3                   THE COURT: All five of your exhibits have been  
4   admitted, so approach him as you see fit.

5                   MR. ESCANO: Thank you, Your Honor.

6   Q. (BY MR. ESCANO): (Indicating.)

7   A. Thank you.

8   Q. Mr. Terepka, this is an email exchange between you and  
9   me.

10   A. Yes.

11   Q. I'll turn your attention to page 9.

12   A. Yep.

13   Q. Do you see your May 4<sup>th</sup> email where you say  
14   (reading), "Working to get you payment ASAP"?

15   A. I do.

16   Q. What did you mean by "payment"?

17   A. "Payment" is the settlement amount.

18   Q. Same as you described during your May -- I'm sorry,  
19   your April 25<sup>th</sup> email?

20   A. Yes.

21   Q. And you understood that word to mean the same?

22   A. The same as Section 2 of the settlement, that amount.

23   Q. Okay. Let's turn to page 6. This is your May 8<sup>th</sup>  
24   email where you say (reading), "Client expected payment to  
25   go out late today"?

1 A. Yes.

2 Q. Was that referring to a sum of money?

3 A. Section 2, the amount in Section 2 of the settlement.

4 Q. That was referring to the amount in Section 2 of the  
5 settlement?

6 A. Yes. All of these communications are about the amount  
7 in Section 2, and there's no dispute about what that amount  
8 is.

9 Q. Where was that payment going out to?

10 A. That payment was going out to you.

11 Q. So the amount in Section 2?

12 A. Yes. Subject to a required backup withholding because  
13 you didn't provide an IRS Form W-9.

14 Q. So subject to backup withholding?

15 A. Yes.

16 Q. Let's move to page 5. This is your May 9<sup>th</sup> email to  
17 me where you said (reading), "The client may be able to send  
18 a check instead"?

19 A. Sorry, where are you?

20 Q. Oh, page 5. Your May 9, 2023, email, the last line  
21 of that email there, when you say (reading), "The client may  
22 be able to send a check instead." Why did you write that?

23 A. Because the client was originally trying to wire the  
24 money, but was not able to verify the wire instructions that  
25 you sent and therefore asked, if I remember correctly, for

1 some additional information, like a bank verification letter  
2 or a canceled check, which you did not provide. I, as an  
3 alternative, offered a check, and you responded that you  
4 would prefer the check option.

5 Q. When you sent that email, how much would -- would the  
6 amount of money in that check be the amount in Section 2 of  
7 the contract?

8 A. The amount of money in that check is the Section 2  
9 amount, less the 24 percent backup withholding.

10 Q. So this one's for sure? It's the amount in Section 2,  
11 less the 24 percent for the backup withholding?

12 A. That's the check that you received several days later,  
13 yes.

14 Q. Okay. And how did you think I interpreted that word  
15 "check" to mean?

16 A. That you'd receive a check for the settlement amount,  
17 which is what defendants sent you.

18 Q. But how much would that check be for?

19 A. That check would be the settlement amount, less the  
20 24 percent required backup withholding.

21 Q. How much did you think it would be for? When I read  
22 your email.

23 A. I don't know what you would think, but as I said --

24 Q. Okay. Thank you.

25 A. -- I thought you knew because you told me --

1 Q. That's fine.

2 A. -- you had settled multiple cases without W-9s, and so  
3 you should have experienced this. In addition, the  
4 settlement's clear in Section 5. And the Form W-9, in the  
5 instructions, are clear. And we specifically --

6 Q. Did I tell you I had ever settled a case --

7 THE COURT: So let's do this: I tried to  
8 front-load this process. It's very difficult for her, when  
9 guys are talk -- people are talking at the same time, to  
10 devote one ear to one voice and the other ear to the other  
11 voice and then get it all down with ten fingers. So let's  
12 talk one at a time.

13 Mr. Escano, if you'll let him finish his answer,  
14 I will require that he let you finish your question.

15 MR. ESCANO: Okay.

16 THE WITNESS: So, apologies, Your Honor. I've  
17 finished the answer.

18 THE COURT: Okay.

19 Q. (BY MR. ESCANO): Did I ever tell you that I  
20 had settled a case before?

21 A. You did.

22 Q. When did I tell you that?

23 A. I don't recall. It was on one of our phone calls and  
24 you mentioned that you'd settled multiple cases without  
25 providing a Form W-9.

1 Q. Did I ever tell you that I had been subject to backup  
2 withholding? Ever.

3 A. No. We didn't discuss that.

4 Q. Okay. Did anything about your impression of how I  
5 believed the settlement was to go change between  
6 May 9<sup>th</sup> and May 12<sup>th</sup>?

7 A. Yes, on May 12<sup>th</sup> when you called and yelled at me.

8 Q. Okay. So that was it?

9 A. Yes.

10 Q. And that call was in response to your letter to me,  
11 right?

12 A. It was.

13 Q. Your May 12<sup>th</sup> letter to me, right?

14 A. Yes.

15 Q. I'm going to present to the witness Plaintiff's  
16 Exhibit 3, which has been entered into evidence.

17 Mr. Terepka, what is this?

18 A. This is the May 12<sup>th</sup> letter that I emailed to you.

19 Q. And tell us again, why did you send this letter?

20 A. I sent this letter to make sure that you had the  
21 authorities explaining that the backup withholding was  
22 required so that you would have that.

23 Q. So I would have what?

24 A. When you received the settlement check, you would have  
25 an explanation of the authorities requiring the backup

1 withholding.

2 Q. When I received the settlement check?

3 A. Yes.

4 Q. On the first page of the letter, second paragraph,  
5 starting at the third line, you say (reading), "Federal law  
6 requires defendants to withhold 24 percent of the settlement  
7 funds and pay that backup withholding to the IRS"; is that  
8 correct?

9 A. Yes.

10 Q. Why did you write that?

11 A. What -- why did I write that?

12 Q. Yeah.

13 A. Because that's the law.

14 Q. But, previously, when you used the terms "payments"  
15 and "check" and "settlement amount," you just said you  
16 thought that would -- you thought that I meant -- you  
17 previously said that, when you used those terms, you were  
18 referring to the amount in Section 2 of the contract minus  
19 any tax requirements; isn't that correct?

20 A. So the settlement check was the settlement amount  
21 minus the backup withholding. And I sent this letter to you  
22 because I thought you knew about that. But I did not know  
23 what you knew, and so this letter was an explanation of the  
24 authorities requiring it, so that you could consider them  
25 when you received the settlement check.



1 Q. Why didn't you tell me this earlier?

2 A. For the reasons I explained before. I thought you  
3 knew. The settlement's very clear in Section 5 -- in  
4 multiple sections. So, one, Section 5 says (reading),  
5 "Plaintiff agrees that the released parties make no  
6 representation, one way or about the other [sic], about  
7 plaintiff's tax liabilities for the settlement payment." It  
8 also says, "Plaintiff agrees he is fully and solely  
9 responsible for any and all of his own tax liabilities with  
10 the respect to the settlement." In other words, whatever  
11 the tax liability may be, it comes out of the settlement  
12 payment, not defendants' pockets.

13 There is also the fact that we discussed the IRS  
14 Form W-9 and its instructions. And I referred you to that  
15 when you were refusing to provide one. And I expected that,  
16 because we'd specifically discussed that, you would have  
17 read it. And you told me that you'd settled multiple cases  
18 without a W-9, in which case you would have experienced it  
19 before.

20 I'm also not your lawyer; I'm the defendants'  
21 lawyer, and it's not my role to advise you in the  
22 negotiation process. And so the purpose of this letter was  
23 because I didn't know -- I thought you knew, but I didn't  
24 know you knew -- to give you a letter that explained the  
25 authorities that required the withholding because of your

1 decision to refuse to provide a W-9.

2 Q. Mr. Terepka, we never discussed backup withholding  
3 prior to May 12<sup>th</sup>. We never used that term. We never  
4 discussed 24 percent, at all, did we?

5 A. That's correct, we did not discuss that.

6 Q. Mr. Terepka, up until May 12<sup>th</sup> or up until  
7 May 10<sup>th</sup>...let's make it May 9th. Up until May 9<sup>th</sup>, you  
8 believed I was to receive the full amount in Section 2 of  
9 the contract; isn't that right?

10 A. Up -- throughout this process, including through  
11 today, I believed that you were entitled to the amount in  
12 Section 2 and were paid that amount consistent with Federal  
13 tax law.

14 Q. But I didn't receive that amount; isn't that correct?

15 A. Just like an employee doesn't receive a full paycheck  
16 because there's withholdings; same thing. You did not  
17 receive the number in Section 2 because the IRS required a  
18 withholding and then -- which was subsequently paid on your  
19 behalf. It is still your money; it is just between you and  
20 the IRS to sort out how much of it you get back, if any.

21 Q. Am I your client's employer -- sorry. Am I your  
22 client's employee?

23 A. No. You're a nonemployee, which is why the Form W-9  
24 is the form that applied.

25 Q. But we had agreed I would not be required to provide a

1 W-9; isn't that right?

2 A. No. We did not agree you wouldn't be required, nor  
3 could we, because it's an IRS requirement. What happened is  
4 defendants requested you provide one, and you refused.

5 Q. But we had come to the agreement, at least, that your  
6 clients would not require a W-9 from me?

7 A. No. What -- that's just not right. The email that we  
8 just reviewed said that defendants can pay without a W-9.  
9 There was no agreement that it wasn't required. And it's  
10 not possible to make that agreement because it is required.  
11 And the IRS can impose penalties for not providing one.

12 Q. And you thought I believed all of that? All of what  
13 you just said, you thought that's what my impression of our  
14 discussions were; is that right?

15 A. I don't know what you thought. What I do know is that  
16 we discussed the IRS form and the instructions, and I  
17 expected that you would have read them. I do know that you  
18 told me you'd settled multiple cases without a W-9. And I  
19 do know that there's clear language in the settlement,  
20 including Section 9 -- excuse me, Section 5 about these  
21 issues.

22 Q. Your clients intended to send me the amount of money  
23 in Section 2 of the contract; isn't that right?

24 A. My clients expected to send you the settlement amount,  
25 and they also expected, and did, to comply with Federal tax

1 law when they did so.

2 Q. At the last minute, sometime between May 9<sup>th</sup> and  
3 May 12<sup>th</sup>, your clients realized they had made a mistake.  
4 They realized they had to -- they had to reduce the  
5 settlement amount; isn't that right?

6 A. No.

7 Q. When did they make that realization?

8 A. I don't know. What I believe is that defendants have  
9 known -- defendants are sophisticated taxpayers who  
10 understand the Form W-9 and the consequences of not  
11 providing one, so they understand that.

12 Q. When did the defendants tell you they would send me  
13 any amount of money other than the amount of money in  
14 Section 2 of the contract?

15 A. That seems privileged because it's asking about a  
16 client communication. In any event, I don't remember.

17 Q. When did you become first aware of that?

18 A. First aware? I don't remember.

19 Q. Okay. And I'll be presenting to the witness  
20 Plaintiff's Exhibit 5, which is already entered into  
21 evidence.

22 Mr. Terepka, what is Exhibit 5, Plaintiff's  
23 Exhibit 5?

24 A. This is emails -- hang on, let me just look to the  
25 back. These are copies of emails between me and you.

1 Q. And on the first page, there is an email from you  
2 dated September 13, 2023, is that correct?

3 A. Yes.

4 Q. What is this email?

5 A. So this email is following up on a series of other  
6 emails that were an effort to reduce the expense of this  
7 hearing by reaching stipulations or at a minimum by allowing  
8 Ms. McKinney to testify by Zoom, remotely.

9 Q. And on Point Number 3, you say that the defendants  
10 paid a backup withholding. You were listing the amount, but  
11 that's confidential, so I'll leave that out of the record.

12 (Reading) "Defendants paid a backup withholding on  
13 plaintiff's behalf to the IRS on June 9<sup>th</sup>, 2023"; is that  
14 correct?

15 A. That's Point 3, yes.

16 Q. Did you ever tell me before when the defendants had  
17 paid the backup withholding?

18 A. So that was first disclosed when defendants produced  
19 their exhibits, which I believe was September 12<sup>th</sup>.

20 Q. In what exhibit was that?

21 A. I would have to see them. I think it's 19, 20, or 21.

22 Q. Okay. So that was the first time you told me when the  
23 backup withholding was made, when you sent the exhibits,  
24 which is the day before this email?

25 A. That is the -- yes, that's -- was the first disclosure

1 of the date that defendants paid the withholding on your  
2 behalf to the IRS.

3 Q. Okay. And this date is more than 14 days after the  
4 execution of the settlement contract, correct?

5 A. I'll look back at the settlement. So the reason for  
6 this date is the IRS requires a batch payment process for  
7 backup withholdings, and defendants complied with the IRS'  
8 requirements for the payment. June 9<sup>th</sup> is more than  
9 14 days after execution.

10 Q. Okay. And I'm assuming you have the settlement  
11 contract up there with you? I just saw you take a look at  
12 it.

13 A. Yeah, that's right, I do. It's 1.

14 Q. So let's just go to Section 2 of the settlement  
15 contract. It says -- about halfway into that section,  
16 Section 2, it says (reading), "Payment shall be by check or  
17 ECH within 14 days of the defendants' receipt of the fully  
18 executed copy of this agreement"; is that correct?

19 A. Yes, that's what it says.

20 Q. And you're telling me that the backup withholding was  
21 sent to the IRS more than 14 days after the execution of the  
22 agreement; is that correct?

23 A. So what I'm saying is the settlement check payment was  
24 paid, per Section 2, faster than 14 business days.  
25 Defendants were required to withhold from that payment a

1 backup withholding, and then defendants were required to pay  
2 that to the IRS per a batch process, not immediately,  
3 because that's the IRS' requirement. And they did that on  
4 June 9<sup>th</sup>.

5 Q. Okay. So the word "payment" here in Section 2 means  
6 something different than how you used it in our email  
7 exchanges in April and May; isn't that correct?

8 A. It doesn't, no.

9 Q. No, it doesn't? Okay. How is it different?

10 A. It's not different.

11 Q. How is it the same?

12 A. It's the same because the check you received is the  
13 settlement payment subject to a withholding that the IRS and  
14 Federal law requires.

15 Q. And the first time we had discussed backup withholding  
16 was on May 12<sup>th</sup>; is that correct?

17 A. Yes. When you called and yelled at me.

18 MR. ESCANO: No further questions.

19 THE COURT: All right. Mr. Meadows, you may  
20 conduct redirect examination, keeping in mind that I had  
21 permitted Mr. Escano to ask him essentially any question  
22 that he wanted. The next and final time Mr. Escano gets a  
23 crack at Mr. Terepka, he will have to restrict his questions  
24 to the subject matter that you are about to go into right  
25 now.

1           MR. MEADOWS: I don't have any further questions  
2 for Mr. Terepka.

3           THE COURT: All right. Mr. Terepka, there's no  
4 redirect examination. That means there's no  
5 recross-examination. You are permitted to step down. You  
6 can resume your seat.

7           Mr. Meadows, call your next witness.

8           MR. MEADOWS: Thank you, Your Honor. Defense  
9 calls Ms. Dee McKinney. She's waiting for us out in the  
10 hall.

11          THE COURT: All right. You know what,  
12 Mr. Barcala?

13          MR. MEADOWS: Oh, I'm sorry.

14          THE COURT: I have questions for Mr. Terepka. So  
15 if you will resume your seat. Sorry about that.

16          My fault, Ms. McKinney. It's my fault.

17          So, gentlemen, this is how this is going to work:  
18 I'm going to ask Mr. Terepka questions I have for him. If  
19 my questions prompt you in ones from either side, you will  
20 be permitted to follow up once only, and I'll start with  
21 Mr. Meadows.

22                           **VOIR DIRE EXAMINATION**

23          THE COURT: Let me start with the easiest  
24 question, Mr. Terepka, and that is, when you mentioned the  
25 name of the signatory for the corporate client, her first



1 name, or his, is Lindsey. Does he or she spell it with an  
2 "A" or an "E"?

3 THE WITNESS: She spells it with an "E."

4 THE COURT: All right. If you know, based on  
5 your experience settling cases on behalf of defendants, does  
6 the provision of a W-9 lead to payment in full to the payee  
7 of the amount agreed upon, plus the issuance of an IRS Form  
8 1099?

9 THE WITNESS: Your Honor, my understanding is  
10 that, with a W-9, there is a payment without a backup  
11 withholding and a 1099 is issued. Without a W-9, there is a  
12 backup withholding and a 1099 still issued. In either  
13 event, there's a 1099, which the IRS requires to keep track  
14 of the payment.

15 THE COURT: And does the 1099 go to the payee and  
16 the IRS or to only one of them? If you know.

17 THE WITNESS: I know it goes at least to the IRS,  
18 I believe, but I don't know for sure. And it may be that  
19 Ms. McKinney is better suited to answer that question.

20 THE COURT: Okay. In your experience, have you  
21 ever had -- I don't know how many times you have dealt with  
22 pro se plaintiffs. Is this the first case?

23 THE WITNESS: No. I've dealt with several, Your  
24 Honor.

25 THE COURT: And have you settled any cases with

1 pro se plaintiffs prior to this one?

2 THE WITNESS: Yes, several.

3 THE COURT: Have you had any other pro se  
4 plaintiff object to providing a W-9?

5 THE WITNESS: No.

6 THE COURT: There was a time when Mr. Escano  
7 provided information in the nature of wiring instructions  
8 when that was the preferred method of payment. Do you  
9 recall what information -- what kind of information he  
10 provided for the purpose of satisfying or triggering a wire  
11 payment?

12 THE WITNESS: Yes. He sent, I believe, an  
13 attachment to an email with wire instructions, including an  
14 account and routing number.

15 THE COURT: You mentioned a batch payment and  
16 IRS' requirement that taxpayers like Humana send it only as  
17 a batch payment. I have an idea of what those words mean,  
18 but why don't you tell me what you understand them to mean.

19 THE WITNESS: Yes. And this is discussed on IRS  
20 Form 940. It's also something that Ms. McKinney may be able  
21 to speak to better than I can because she lives that. In  
22 any event, the batch payment process is an IRS requirement  
23 to pay withholdings in a group instead of in real time  
24 because many taxpayers, including large corporate ones, wind  
25 up making, many sometimes hundreds, of withholdings per

1 month, some of which can be very small, \$10, \$20. So the  
2 IRS doesn't want a flood of constant payments, and so it has  
3 a monthly or semi-monthly, depending on the circumstances,  
4 schedule or batch payments of backup withholdings. And then  
5 the IRS Form 945, as I understand it, is the form to  
6 annually report all of those batch payments.

7 THE COURT: Okay. I was going to ask you -- and  
8 I recognize Ms. McKinney might be a better witness for this,  
9 but Defendants' Exhibit Number 40 -- correction, 19, not  
10 40 -- 19 includes an amount that is different from any  
11 amount we've heard about. And does the concept of the batch  
12 payment explain the difference in numbers?

13 THE WITNESS: So I don't have D-19 in front of  
14 me.

15 THE COURT: (Indicating).

16 THE WITNESS: Thank you, Your Honor.

17 THE COURT: The record should show I've just  
18 handed Defendants' 19 to the witness.

19 THE WITNESS: Yes. This -- sorry. Just to  
20 answer your question -- yes, you did hand it to me, but also  
21 to answer your question, yes, this explains that. This is a  
22 record reflecting the batch payment that included the backup  
23 withholding payment withheld from the settlement payment.

24 THE COURT: During your direct examination, you  
25 mentioned the very first time that the subject of a W-9 had

1     come up. You discussed explaining to Mr. Escano where the  
2     information can be found that supports your view of things  
3     both in the form itself as well as the instructions that go  
4     along with it.

5             Did he have a response? Do you recall whether he  
6     responded to your suggestion that he look at these sources  
7     of authority?

8             THE WITNESS: I don't recall. I remember  
9     referring him to them. I don't remember a response, one way  
10    or the other. And, ultimately, his response was just to  
11    decline any W-9.

12            THE COURT: Okay. I want to ask you questions  
13    now. Mr. Escano and Counsel, this is the one time I get to  
14    ask witnesses questions about anything. I'm going to ask  
15    questions about fees. I don't want either side to read  
16    anything into my questions, but this is the one time I have  
17    a chance to ask about it.

18            How many times since you have been specializing  
19    in the TCPA have you sought fees from -- sought a judicial  
20    order requiring fees to be paid by the plaintiff?

21            THE WITNESS: I have never.

22            THE COURT: The --

23            THE WITNESS: Well, I want to make sure I'm  
24    accurate about that. I, in one other matter, sought -- I  
25    was on a team that sought sanctions against a plaintiff, but

1 it was statutory and not based on a contract.

2 THE COURT: Okay. All right. The New Jersey  
3 case, besides the word "new," we don't share much in common  
4 with New Jersey out here in New Mexico. I'll confess that I  
5 haven't read much yet about that case. Do you know whether  
6 it involved a settlement and a breach by the plaintiff or  
7 was it a completely different fact pattern?

8 THE WITNESS: That was a different fact pattern.  
9 So that case involved a plaintiff that had originally been  
10 represented. Counsel for plaintiff ultimately withdrew from  
11 that. And the plaintiff, after the withdrawal of counsel,  
12 defaulted. The defendants sought fees. And, if I can  
13 refresh my recollection with the exhibit, I can't remember  
14 if the basis was statutory or contractual. I believe it may  
15 have been contractual.

16 THE COURT: That would suggest that there had  
17 been a settlement?

18 THE WITNESS: Except there hadn't been a  
19 settlement. The basis for the fee-shifting had been terms  
20 and conditions that the plaintiff had agreed to before the  
21 litigation. So that's a substantial difference to your  
22 question about, you know, are they different or similar,  
23 because, in this case, the fee-shifting contract was entered  
24 as part of the settlement, as Your Honor knows. And that's  
25 uniquely different than that case because Mr. Escano, by

1     that point, knew who defense counsel was and that they were  
2     out-of-town national defense counsel.

3             THE COURT: So the timeline here is important to  
4     me. Your initial outreach to Mr. Escano occurred on March  
5     the 27<sup>th</sup> of this year. And the way I read the exhibits,  
6     within nine days of your initial outreach, the parties had  
7     agreed to what you have described as an enforceable  
8     settlement. Within nine days. And the evidence thus far  
9     appears to me to show that, at that point, you diverted away  
10    from being a TCPA -- a national TCPA specialist to kind of  
11    an ordinary run-of-the-mill contract lawyer, which is what  
12    has marked this skirmish ever since. Is that a fact for the  
13    Court to consider in deciding the reasonableness of an  
14    attorney's fee award?

15            THE WITNESS: Is that a relevant factor? So I  
16    think it's especially relevant to the hours spent, because  
17    the fact that we began as TCPA defense lawyers, which I  
18    think was a key factor in being able to reach a settlement  
19    quickly, first contributed to reaching a resolution. But  
20    then, after that, because we had been involved in the case  
21    already, it was much more efficient for us to continue to  
22    prepare the materials, including for the motion to enforce,  
23    than it would have been, say, to just hand over the file to  
24    someone new.

25            THE COURT: Do you hold yourself out as a

1 national contract specialist, as you do a specialist under  
2 the TCPA?

3 THE WITNESS: I would say only to the extent that  
4 it relates to TCPA matters. So in this case, certainly, but  
5 you know, not in the mega business contract dispute context.

6 THE COURT: I mean no insult by this, but there's  
7 nothing special about this settlement agreement. I mean,  
8 I've seen these across the spectrum of causes of action. Am  
9 I missing what is so special about this settlement agreement  
10 that it needs to be negotiated by a national TCPA specialist  
11 as opposed to kind of a regular contract lawyer?

12 THE WITNESS: So I think, from my perspective,  
13 Your Honor, respectfully, the answer is "yes." So why do we  
14 need a national TCPA defense counsel for this matter,  
15 including for negotiating a settlement? For one, it's never  
16 clear whether a matter is going to settle. So you don't  
17 pick counsel with the expectation that, "Well, it's going to  
18 settle. I just need someone who can get a resolution here,"  
19 because you just don't know. And that's especially true in  
20 matters involving serial pro se litigants who are, frankly,  
21 well understood to be unpredictable. The other piece of  
22 that is, in selecting counsel for a matter like this, a  
23 defendant would consider the need for national TCPA defense  
24 counsel because Mr. Escano, as far as I can tell, may be the  
25 most experienced TCPA litigator in the entire state of New

1 Mexico, and defendants do not have a similarly experienced  
2 TCPA defense counsel to even pick from in New Mexico. So  
3 that's why, in many matters where Mr. Escano is suing and  
4 choosing to sue out-of-state defendants, as I believe the  
5 Court is aware, very frequently, the companies that he's  
6 suing make what I believe is a very reasonable choice to  
7 hire experienced TCPA -- national TCPA defense counsel to go  
8 up against a litigant who is extremely experienced in this  
9 high-exposure area.

10 THE COURT: All right. You're seeking fees,  
11 according to Exhibits 37, 38, and 39, for two different  
12 categories of work that have begun since May the 12<sup>th</sup> of  
13 this year. One of them is enforcing the defendants' rights  
14 to compel Mr. Escano to remain in this settlement that he  
15 agreed to. That's Assignment Number 1, Bucket Number 1.  
16 But you've also sought fees for the work that you've done to  
17 respond to his effort to reignite this litigation in the  
18 wake of him declaring a material breach.

19 As between those two buckets -- you've got my  
20 picture?

21 THE WITNESS: Yes, sir.

22 THE COURT: As between those two buckets -- and I  
23 just want an approximation, and I promise I won't hold you  
24 to it. I'm just trying to understand the bill -- what  
25 percentage of the overall work since May 12 for which you're



1 seeking fees belongs to the enforcement bucket and the  
2 fighting his attempt to resume litigation bucket. What's  
3 the percentage breakdown?

4 THE WITNESS: A very rough percentage breakdown,  
5 Your Honor, would be a substantial majority of the time is  
6 spent on the first bucket of enforcing the settlement and  
7 responding to the cross-motion to void, which were  
8 substantial undertakings, both in terms of research and  
9 evidence and briefing. Then a significant portion -- it's  
10 hard to estimate too precisely, but maybe a quarter, maybe a  
11 third -- please don't hold me to it, but something in that  
12 range would be the other things that impose fees after the  
13 breach of the settlement.

14 THE COURT: Okay. So if I wanted to use a really  
15 sharp pencil -- and I'll ask you a question that suggests  
16 why in a moment -- am I, an outsider to the billing  
17 practices of your firm and the Atkinson firm, am I going to  
18 be able to distinguish which line item belongs to which  
19 bucket?

20 THE WITNESS: So we try to do our time entries  
21 pretty specifically, so the hopeful answer is "yes." To the  
22 extent that the Court feels that's not the case, defendants  
23 could resubmit with a specific delineation of what belongs  
24 in each bucket.

25 THE COURT: So the reason I'm asking this

1 question is I am -- I didn't know this was happening because  
2 I didn't see the exhibits, I didn't see the emails until I  
3 saw the litigation. And some of the emails I didn't see  
4 until last week. Why on Earth did a national TCPA  
5 specialist, a lawyer with chops, according to his CV, why  
6 didn't you just ask for an order to stay the litigation,  
7 pending the outcome of Bucket Number 1? This happens  
8 routinely in Federal litigation. I'm sure you've asked for  
9 a stay before. Why did you not do so here?

10 THE WITNESS: So the short answer to that is  
11 defendants acted as if there was a stay and asked --

12 THE COURT: But your litigation adversary didn't  
13 share that understanding. You were frustrated and irritated  
14 by it. You don't hide it well. Don't become a poker  
15 player. Why didn't you ask the referee to put the game on  
16 ice until we figure out if the game's over? Did you think  
17 about moving for a stay?

18 THE WITNESS: Did not consider that, including  
19 because things like threatening to sue me personally,  
20 that -- a stay wouldn't necessarily even apply to that, and  
21 I had never experienced that before. And then other things,  
22 like the cross-motion to void, didn't seem like something  
23 where we could ask for a stay, necessarily.

24 THE COURT: But with discovery and Rule 26(f)  
25 conferences and the whole badminton game of responding to

1 emails, you didn't think about asking for judicial relief,  
2 if, for no other reason, than not to drive up your client's  
3 cost of legal representations?

4 THE WITNESS: So I didn't think of that, because  
5 a stay -- as I have experienced, requests to stay discovery,  
6 when, say, there's pending deposition dates, wouldn't  
7 necessarily be a stay of emails to defendants. I don't -- I  
8 don't know that the Court has authority to order a party --  
9 I mean, perhaps it does -- not email them. In any event,  
10 the email exchanges on things like 26(f) are a small  
11 fraction of the requested fees. The more --

12 THE COURT: If you had sought, and I had granted,  
13 a stay, your responsive emails back to him, I'm guessing,  
14 would have pointed to the stay and maybe there would have  
15 been far fewer of them, yes?

16 THE WITNESS: Yes, Your Honor. That is --

17 THE COURT: Okay.

18 THE WITNESS: -- that's correct.

19 THE COURT: Let's see if I have any other  
20 questions.

21 No. Mr. Meadows, did my questions prompt any  
22 follow-up from you?

23 MR. MEADOWS: Your Honor, I would say not with  
24 the witness. The only exception would be on the issue of  
25 batch payments. If it would be helpful to the Court, we

1 have prepared a very short pocket brief that explains the  
2 legal basis and requirement for that. We're happy to hand  
3 that up to you, if you'd be interested in that.

4 THE COURT: I might. We'll take that up when  
5 Ms. McKinney is with us.

6 All right. Mr. Escano, did my questions prompt  
7 any follow up from you?

8 MR. ESCANO: Yes, Your Honor. It's just a  
9 couple.

10 THE COURT: Okay.

11 **CROSS-EXAMINATION (Continued)**

12 Q. (BY MR. ESCANO): Mr. Terepka, you've submitted  
13 some cases in the defendants' exhibits, you've  
14 submitted them into evidence, I think it was a  
15 couple of cases. All of those cases were basically  
16 regarding collection of fees for motions to enforce  
17 or was there something different there?

18 A. Those cases relate to fee requests in other lawsuits.

19 Q. So just fee requests; there wasn't an underlying  
20 motion to enforce?

21 A. I don't -- I'm not sure whether any of them involved a  
22 motion to enforce. At least one of them involved a  
23 contractual basis for fees, but the contract was before the  
24 litigation, is my understanding.

25 Q. And in the -- the cases that you cited in your briefs

1 on the pending motions here today, did you ever cite a case  
2 that involved a motion to enforce from one side but then  
3 where the other side is saying the contract at issue is  
4 void; not to enforce the contract, but that the contract at  
5 issue is void, it's no good? Did you cite any of those  
6 cases -- any of those kinds of cases?

7 A. I couldn't find a case where a party filed an  
8 unnecessary motion to void.

9 Q. Okay. And then, finally, you've submitted a fee  
10 request -- well, yeah, you have a fee request for about -- a  
11 fee request isn't confidential? It's not, right?

12 THE COURT: It's not confidential.

13 Q. So you submitted a fee request for \$163,000, correct?

14 A. Yes.

15 Q. Approximately. Why didn't your client -- to resolve  
16 this, why didn't they just plus up the payment to me? Why  
17 didn't they just say, the payment is -- I won't use exact  
18 figures, but --

19 THE COURT: "X" plus "Y"?

20 MR. ESCANO: Yeah, exactly.

21 Q. (BY MR. ESCANO): -- pay the extra to the IRS,  
22 send me the full amount in Section 2 of the  
23 contract, and have this over with? Why didn't they  
24 do it that way?

25 A. Because my client's position is that they already

1 settled the case and that they're entitled to enforce it  
2 under the terms of the contract, and that it is not  
3 appropriate to try to backtrack or, in one instance, you  
4 offered to provide a W-9, but only for more money. And my  
5 clients decided to enforce their rights because that was the  
6 whole point of the settlement, to end the case.

7 Q. But doing it that way, that would have resolved this a  
8 lot less expensively than spending so much money on fees,  
9 isn't it -- wouldn't it have?

10 A. So would have complying with the settlement or  
11 providing a W-9, which is what defendants asked you to do,  
12 but you declined.

13 Q. But I wouldn't have gotten the amount of money I  
14 thought I would be getting, correct?

15 A. I don't know what you thought. You got the amount of  
16 money you're entitled to in Section 2, under Federal law.

17 MR. ESCANO: Okay. Thank you. No further  
18 questions.

19 THE COURT: Mr. Terepka, you can step down and  
20 resume your seat.

21 And now we're ready for Ms. McKinney. How long  
22 do we anticipate she'll testify?

23 MR. MEADOWS: Your Honor, I think it will be very  
24 brief, ten minutes.

25 THE COURT: We'll finish with her testimony and

1 then I'll ask what the parties wish to do with respect to a  
2 break.

3 **DIONNE MCKINNEY,**

4 After having been first duly sworn, did make the  
5 following answers:

6 **DIRECT EXAMINATION**

7 THE COURT: Take a seat. Please make yourself  
8 comfortable.

9 Do you want her to have all those exhibits at the  
10 witness stand?

11 MR. MEADOWS: We'll use a very small portion of  
12 those, but I think it would be the easiest thing to do.

13 THE COURT: Tell us your full name and spell your  
14 last name for the record.

15 THE WITNESS: Dionne McKinney. Last name is  
16 spelled M-C-K-I-N-N-E-Y.

17 THE COURT: Spell your first name, please.

18 THE WITNESS: D-I-O-N-N-E.

19 MR. MEADOWS: Thank you, Your Honor.

20 Q. (BY MR. MEADOWS): I'm not actually sure if  
21 it's still morning, but I'll go with "good  
22 afternoon," Ms. McKinney. Would you please tell the  
23 Court where you currently live.

24 A. I currently live in Louisville, Kentucky.

25 Q. Are you employed?

1 A. Yes, I am.

2 Q. Where do you work?

3 A. Humana.

4 Q. How long have you worked at Humana?

5 A. A little over 12 years.

6 Q. And maybe we all know this, but just in case we don't,  
7 what does Humana do?

8 A. Humana is an insurance company, for the most part.  
9 And they also acquire other companies.

10 Q. Now, what is your current job at Humana?

11 A. Currently, I'm the tax information reporting  
12 professional.

13 Q. How long have you had that job?

14 A. A little over four years.

15 Q. Now, as a tax information reporting professional, can  
16 you describe for the Court your duties and responsibilities?

17 A. I am responsible for the distribution of 1099s, as  
18 well as filing them with the IRS; distributing and filing  
19 1095(b) forms, which are proof of medical coverage;  
20 interacting with the IRS regarding our 1099 penalties, as  
21 well as fielding any inquiries from Humana associates or  
22 outside.

23 Q. Have you, in the course of performing your job at  
24 Humana, ever heard of a "Form W-9"?

25 A. Yes, I have.



1 Q. Do you have any responsibility at Humana with regard  
2 to Form W-9s?

3 A. With the W-9s, our team is -- we just make sure that  
4 the different teams and departments collect the W-9, just to  
5 make sure that we have valid tax reporting information from  
6 the taxpayer.

7 Q. Have you heard of a concept called -- I'm sorry. Have  
8 you heard of a concept called "backup withholding"?

9 A. Yes, I have.

10 Q. Now, again, in performing your responsibilities as a  
11 tax information reporting professional, do you have any  
12 responsibilities with regard to backup withholding?

13 A. I do.

14 Q. Could you describe those, please?

15 A. With the backup withholding, I make sure that any  
16 taxpayers are flagged for backup withholding for various  
17 reasons as directed by the IRS. We get those payments off  
18 to the IRS once a month, and then we also report it on the  
19 1099s that we send out once a year.

20 Q. In performing your job, again, at Humana, what --  
21 under what circumstances does the company actually do a  
22 backup withholding?

23 A. So if we receive a B notice, after we have transmitted  
24 the 1099s to the IRS, they will basically tell us, "Hey,  
25 this name and tax ID number doesn't match what we show in

1 our records; please mail out this letter and request a W-9"  
2 or some type of letter from the IRS validating what their  
3 current name and tax ID number is.

4 Q. In performing your job, do you have any responsibility  
5 with regard to settlement payments that Humana might make  
6 from time to time?

7 A. My only responsibilities related to settlement  
8 payments is just making sure we get a W-9 and that it's  
9 validated.

10 Q. Now, just to be clear on what you do and what maybe  
11 you don't do, do you have any responsibility for preparing  
12 Humana's corporate tax return every year?

13 A. No, I don't.

14 Q. Do you have any responsibility for deciding which  
15 expenses Humana can deduct from its tax return and which  
16 ones it can't?

17 A. No.

18 Q. Now, in your answer a few moments ago when I asked you  
19 about settlement payments -- and I think you responded that  
20 your responsibility is to make sure that you get a W-9 --  
21 why does the company ask for W-9s in connection with  
22 settlement payments?

23 A. The IRS requires that we obtain a W-9. And that form  
24 is basically just the request for the taxpayer  
25 identification number and certification.

1 Q. All right. Let me ask you, as a general matter,  
2 before we get into this particular case, about how Humana  
3 actually pays backup withholdings to the IRS. Can you  
4 describe that process for us?

5 A. On a monthly basis, we reconcile our accounts that we  
6 pretty much hold the backup withholding in. We'll pull  
7 several reports, and one of those is a report that contains  
8 all the backup withholding that we've collected from the  
9 different taxpayers. We'll reconcile just to make sure that  
10 it balances back to what the ending balance is for that  
11 account. And then we'll make a batch payment for what we  
12 collected the previous month.

13 Q. Now, you used the words "batch payment." Can you tell  
14 us what you mean by that, exactly.

15 A. We make a lump-sum payment instead of paying the  
16 individual deductions that we've made.

17 Q. How often does Humana make these batch payments of  
18 withholdings to the IRS?

19 A. Once a month.

20 Q. Why is it a once-a-month payment?

21 A. The IRS wants us to make a batch payment instead of  
22 the individual statements.

23 Q. I don't know that you're able to generalize, but if  
24 you can, how many backup withholdings in a typical month  
25 does Humana make?

1       A.     Probably -- I mean, sometimes we can do several  
2     hundred a day.

3       Q.     Okay.  Now, let's turn to this particular case that  
4     we're here to talk about today, the *Escano versus IFG* case.  
5     Have you done any work at Humana relating to this case?

6       A.     I have.

7       Q.     What did you do?

8       A.     I ensured that the vendor record that we set up was  
9     flagged for Federal backup withholding.

10      Q.     When you say "vendor record," what do you mean,  
11     exactly, by that?

12      A.     So, when we make a payment to any taxpayer, we have to  
13     set them up in our system as a vendor.  So we had a vendor  
14     record for Mr. Escano as well.

15      Q.     Okay.  Now, was there a backup withholding done as to  
16     the payment made to Mr. Escano?

17      A.     Yes, it was.

18      Q.     Why?

19      A.     Because we did not receive a W-9.

20      Q.     When was that backup withholding payment made to the  
21     IRS?

22      A.     In June.

23      Q.     And was that as part of a batch payment that Humana  
24     made that month?

25      A.     Yes.

1 Q. Would it have been possible for Humana to make the  
2 withholding payment of Mr. Escano's funds to the IRS sooner  
3 than June?

4 A. No.

5 Q. Why not?

6 A. Because we have to wait until we have collected all  
7 the backup withholding for that particular month before we  
8 can make a payment.

9 Q. And so just to be specific about that, we made the --  
10 since the settlement payment to Mr. Escano was made in May,  
11 did you need to wait until all the backup withholdings for  
12 May were collected before that batch payment was made?

13 A. Correct.

14 Q. Thank you. I want to show you a few documents  
15 briefly. I'll tell you ahead of time the amounts that we  
16 are talking about here are generally confidential. So I'm  
17 going to ask you questions about these documents, but I  
18 would caution you not to cite any specific dollar amounts,  
19 unless I or the Court asks you to do that; is that fair?

20 A. Okay.

21 Q. Okay. Thank you. I'm going to start with  
22 Exhibit 19 -- I should say Defendants' Exhibit 19. Do you  
23 recognize Defense Exhibit 19, Ms. McKinney?

24 A. Yes, I do.

25 Q. Could you describe for the Court what that is.

1       A.     That is a screenshot from the IRS website of the  
2     payment that we made to the IRS for May federal backup  
3     withholding.

4       Q.     Now, it looks like, up in the upper left-hand corner  
5     of the Exhibit 19, it says "Humana, Inc."; do you see that?

6       A.     Yes.

7       Q.     Do you understand why it refers to "Humana" there?

8       A.     That is the account, since they're the parent company.

9       Q.     All right. And do you know who made this screenshot  
10    that we see here?

11    A.     Yes. It was my manager.

12    Q.     There's a dollar amount in the -- kind of in the  
13    middle of the document. Do you see where it says "payment  
14    amount," and it lists a dollar amount there?

15    A.     Yes.

16    Q.     Without reciting a number -- I know this is a  
17    different number than what we're talking about here, but can  
18    you tell us what that dollar amount relates to?

19    A.     That is the batch payment amount for all of the May  
20    Federal backup withholding.

21    Q.     All right. So does that batch payment amount include  
22    the amount that was paid to the IRS on behalf of Mr. Escano?

23    A.     Yes.

24    Q.     But, in addition to Mr. Escano's withholding, were  
25    there other amounts included in that dollar amount?

1 A. Yes, there were.

2 Q. All right. Thank you.

3 How do you know that Mr. Escano's backup  
4 withholding payment is included in the amount that we see on  
5 Exhibit 19?

6 A. It was included as a line item in one of the reports  
7 that we pulled for the recon.

8 Q. Now, this record, this screenshot --

9 THE COURT: Excuse me. What is a "recon"?

10 MR. MEADOWS: He's asking you.

11 THE WITNESS: A "recon" is -- so it's a  
12 reconciliation.

13 THE COURT: Got it. Now I know what you mean. I  
14 did not understand "recon" until you said "reconciliation."

15 MR. MEADOWS: Thank you, Your Honor.

16 Q. (BY MR. MEADOWS): All right. Let me show you  
17 Defendants' Exhibit 20. And, Ms. McKinney, do you  
18 recognize Defendants' Exhibit 20?

19 A. Yes, I do.

20 Q. Can you describe for the Court what this is?

21 A. It is an excerpt from the original report that we  
22 pulled that showed all the Federal backup withholding.

23 Q. When you say "report," is there a particular report  
24 that you're referring to?

25 A. Yes.

1 Q. What's that?

2 A. So within the reconciliation, we pull several reports.  
3 And one of those are the AP transactions invoices, and this  
4 is basically what this report is.

5 Q. Are those AP transactions that you referred to  
6 something that are reflected in Humana's corporate records?

7 A. Yes.

8 Q. Now, you think you referred to Exhibit 20 as an  
9 "excerpt." Do you know who made this excerpt?

10 A. Yes.

11 Q. Who was that?

12 A. We did, Humana.

13 Q. Humana. People you work with in your department?

14 A. Correct.

15 Q. Now, without reciting the dollar amount, I would like  
16 to ask you, does this excerpt, Defendants' Exhibit 20,  
17 reflect the amount of the backup withholding as it related  
18 to Mr. Escano?

19 A. Yes, it does.

20 Q. And in the middle of the three rows in this excerpt,  
21 do you see Mr. Escano's name somewhere?

22 A. Yes.

23 Q. And where is that?

24 A. It's under the supplier name.

25 Q. Okay. And just to the right of that, it looks like



1     there is a column for batch name? Do you see that?

2     A.    Yes.

3     Q.    Can you -- do you know what that is?

4     A.    The batch name is actually the name of the upload that  
5     was used when it was processed.

6     Q.    All right. Now, is the amount of the backup  
7     withholding that relates to Mr. Escano, is that amount  
8     reflected under "AP amount" that you see in the third row  
9     here?

10    A.    Yes, it is.

11    Q.    In the third row, there's a section for transaction --  
12    I'm sorry, "transaction description." Do you see that?

13    A.    Yes.

14    Q.    And what does it say there?

15    A.    "Ruben Escano settlement."

16    Q.    And why does it refer to the "Ruben Escano settlement"  
17    there?

18    A.    This was actually pulled from the original invoice  
19    that was keyed.

20    Q.    All right. One last exhibit to take a look at, which  
21    is going to be Defense Exhibit 21. Ms. McKinney, do you  
22    recognize Defendants' Exhibit 21?

23    A.    Yes, I do.

24    Q.    What is this?

25    A.    It is the bank's transaction report from Humana's bank

1 account.

2 Q. Now, I see on the first two pages -- pardon me -- all  
3 pages of this exhibit, there is a lot of information blacked  
4 out. Do you know why that is?

5 A. Yes.

6 Q. And why is it?

7 A. So the -- all the transactions that have been redacted  
8 are the different payments that we either make to our  
9 individual associates or our other suppliers or vendors.

10 Q. In other words, are the blacked-out entries payments  
11 that were made to people other than Mr. Escano --

12 A. Correct.

13 Q. -- and payments, as far as you know, that have nothing  
14 to do with Mr. Escano at all?

15 A. Correct.

16 Q. All right. Now, there is one entry that's not blacked  
17 out, and it's on the second page. Can you tell us what that  
18 refers to?

19 A. That refers to the batch payment amount that we paid  
20 to the IRS.

21 Q. All right. And is that batch payment amount on  
22 Exhibit 21, does that include the backup withholding as it  
23 related to Mr. Escano?

24 A. Yes, it does.

25 Q. Now, the amount that's reflected in Exhibit 21 as the

1 batch payment, is that the same amount from Exhibit 19 that  
2 we reviewed just a few minutes ago?

3 A. Yes.

4 MR. MEADOWS: One moment, if I may Your Honor.

5 (Discussion off the record.)

6 MR. MEADOWS: No further questions. Thank you,  
7 Ms. McKinney.

8 THE COURT: Mr. Escano, as I promised, you have  
9 the right to cross-examine Ms. McKinney. You can ask her  
10 any question you want that relates to the direct examination  
11 that you just heard.

12 **CROSS-EXAMINATION**

13 Q. (BY MR. ESCANO): Good afternoon, Ms. McKinney.

14 A. Good afternoon.

15 Q. Thank you for being here. I know it's a bit of a trip  
16 for you, so thank you.

17 I just want to ask you some questions about these  
18 three exhibits here. And you already have them in front of  
19 you. If you can pull out Exhibit 20, the one they handed  
20 you before the last one.

21 So, on the second row, there's an invoice date.  
22 What is that invoice date?

23 A. The invoice date represents when the invoice was  
24 actually processed in our system.

25 Q. Okay. And what about the GL date?

1       A.    The GL date represents when it was posted to our  
2   general ledger.

3       Q.    And when you say "posted to our general ledger," are  
4   you just -- are you just saying that it goes into your  
5   company's accounts, it's tallied, or is there something  
6   different?

7       A.    No, it's when it's posted to our expense account.

8       Q.    Okay.  When was this document prepared?

9       A.    Do you mean --

10      Q.    The excerpt.

11      A.    -- the report itself?

12      Q.    The what?

13      A.    The report itself?

14      Q.    Yeah, this excerpt here.

15      A.    We pulled this in June.

16      Q.    June.  Do you remember around when in June?  Late  
17   June?  Early June?

18      A.    Early June.

19      Q.    Early June.  Okay.  Why was it prepared?

20      A.    It was prepared to -- for the reconciliation, so we  
21   could determine what amount to pay to the IRS.

22      Q.    Okay.  You mentioned earlier with opposing counsel  
23   that this payment was flagged for withholding.  Do you  
24   remember that?  Is that true?

25      A.    Yes.

1 Q. Okay. Do you remember when that happened?

2 A. The payment was flagged in May.

3 Q. Do you remember the date?

4 A. No, I don't.

5 Q. Okay. How are you -- so, generally -- so you do this  
6 a lot, it sounds like. It's your primary job; is that  
7 right?

8 A. Yes, it is.

9 Q. Okay. So your job is to look at payments -- and  
10 correct me if I'm wrong, but your job is to look at payments  
11 going out, make sure that they're in compliance with tax  
12 policy; is that true?

13 A. No.

14 Q. "No"? Okay. Can you just give me a brief idea how  
15 my -- what's your job, basically?

16 A. So my job, in addition to reconciling our Federal  
17 backup withholding account, is sending out 1099s, filing  
18 them with the IRS, communicating with the IRS regarding the  
19 penalties related to those 1099s, communicating with Humana  
20 associates, as well as external business partners.

21 Q. Okay. Thank you. And all of those interactions, all  
22 of those tasks that you do, they are tied to a person, maybe  
23 a settlement payment, some kind of -- some kind of payment  
24 that Humana sends; is that correct?

25 A. Correct.

1 Q. Okay. And you get notice of these payments in some  
2 manner, right? I mean, someone in Humana tells you, "Hey,  
3 our company is sending out a payment. Can you" -- they tell  
4 you about the payment being sent out; is that correct?

5 A. Not necessarily.

6 Q. How are you informed of the payments?

7 A. Well, I would say, when I pull the report, it will  
8 show the payments that were made related to the Federal  
9 backup withholding.

10 Q. Okay. So with this case, with this settlement, it  
11 sounds like -- correct me if I'm wrong, but it sounds like  
12 you were just involved with sending the backup withholding  
13 out; is that correct?

14 A. Correct.

15 Q. And when did you -- and you said it was sometime in  
16 May you became aware of the backup withholding that needed  
17 to be sent out?

18 A. Correct.

19 Q. Okay. Was it late May? Mid-May? Around when?

20 A. I believe it was late May.

21 Q. Late May? Okay. Maybe after May 12<sup>th</sup>?

22 A. I'm not sure. I would have to go back and look at my  
23 emails.

24 Q. But you said -- but late May, right?

25 A. Correct.

1 Q. Okay. Usually, when do you get notified of a backup  
2 withholding needing to be sent out? In relation to the --  
3 in relation to the payment, the underlying payment.

4 A. So, typically, I wouldn't necessarily be notified, but  
5 I am responsible for making sure that, if there is a  
6 particular tax ID number set up with a vendor, whether it's  
7 a medical provider, that that account is flagged. And we  
8 have so many payments that come through that I don't see all  
9 the payments, but like I said, when I pull this  
10 reconciliation report, that's when I kind of have a little  
11 overview of what payments were made that had Federal backup  
12 withholding deducted from it.

13 Q. Okay. So sometime in late May, you were...

14 So you just -- you look at reports that are --  
15 that you have access to?

16 A. Correct.

17 Q. And I'm assuming these reports are updated fairly  
18 regularly?

19 A. Yes.

20 Q. And you go through and check to see if backup  
21 withholding has been taken appropriately; is that correct?

22 A. Correct.

23 Q. Okay. And so you first became aware of my name, Ruben  
24 Escano, around late May? Would I be correct in assuming  
25 that?

1 A. I believe so, but I would need to check my emails.

2 Q. Okay. But not in April of this year --

3 A. No.

4 Q. -- the previous month? Okay.

5 And so, just to be clear, when you pull the  
6 report, no one is telling you about the report; this is  
7 something that you do just to check? That's your job,  
8 you've got to check the reports, make sure they're in  
9 compliance with the taxes?

10 A. That is correct.

11 Q. Okay. Thank you.

12 MR. ESCANO: No further questions.

13 THE COURT: Mr. Meadows, any redirect  
14 examination?

15 MR. MEADOWS: No, Your Honor.

16 THE COURT: I've got a few questions. And,  
17 again, I'll allow the parties to ask any by virtue of what  
18 I'm going to ask.

19 **VOIR DIRE EXAMINATION**

20 THE COURT: So, Ms. McKinney, I'm sorry about  
21 this screen, it's really blocking the two of us, but give me  
22 a sense of how often it happens that Humana has to do a  
23 backup withholding with respect to a vendor payment.

24 THE WITNESS: That occurs several times a year.

25 THE COURT: Okay. And you've been in this job



1 for more than four years. Can you tell me what the most  
2 common reason is why backup withholdings are sent to the  
3 IRS?

4 The question ended there.

5 THE WITNESS: The most common reason would be the  
6 name and tax ID number doesn't match what the IRS shows in  
7 their system.

8 THE COURT: How about the refusal to provide a  
9 W-9 at all? Has that happened in your experience before  
10 this case?

11 THE WITNESS: Not that I can honestly remember.

12 THE COURT: The batch payment for the month of  
13 May which Humana sent to the IRS the month of June, I'm just  
14 curious, is that a roughly typical size for an IRS batch  
15 payment for a month?

16 THE WITNESS: Lately, yes, it has been. We've  
17 gotten better. At lowering the payment.

18 THE COURT: Okay. So that means it's trending  
19 smaller rather than higher?

20 THE WITNESS: Yes.

21 THE COURT: All right. Exhibit 21 -- correction,  
22 Exhibit 20. I just want to ask you a very small handful of  
23 questions about that.

24 First, Exhibit 20, in the second -- in the second  
25 row, you mentioned AP amount, and I just want to make sure

1 the transcript reflects, what is "AP"? "Accounts payable"?

2 THE WITNESS: Yes.

3 THE COURT: All right. And in between  
4 Mr. Escano's name in that same second row and the accounts  
5 payable amount, there's a batch name. And that batch name,  
6 it seems to me, includes a naming convention that includes a  
7 date as part of the naming convention. Am I right?

8 THE WITNESS: That is correct.

9 THE COURT: And tell me what happened on May the  
10 10<sup>th</sup> of this year with respect to this backup withholding?

11 THE WITNESS: That would have been when the AP  
12 processor keyed the payment in our payment system.

13 THE COURT: And is the word "batch" that is used  
14 in this column, batch name, is that batch related to the  
15 IRS' requirement for a batch payment or does it -- is it  
16 unrelated to it?

17 THE WITNESS: It's unrelated.

18 THE COURT: Mr. Meadows, did my questions prompt  
19 any follow-up from you?

20 MR. MEADOWS: I don't believe so, Your Honor.

21 Thank you.

22 THE COURT: Mr. Escano?

23 MR. ESCANO: Just one question.

24 THE COURT: All right.

25 **RECROSS-EXAMINATION**

1 Q. (BY MR. ESCANO): Hello again, Ms. McKinney.

2 A. Hi.

3 Q. Would Exhibit 20 -- we were just talking about  
4 Exhibit 20, this excerpt, would this be different -- any  
5 information on here be different if the payment was a wire  
6 transfer instead of a check?

7 A. No.

8 Q. And the reports that you get, those include checks and  
9 wire transfers; it doesn't matter about the payment type?

10 A. That's correct.

11 MR. ESCANO: No further questions.

12 THE COURT: Is there any reason why Ms. McKinney  
13 cannot be permanently excused from this hearing so that she  
14 can resume her travel back home?

15 MR. MEADOWS: No, Your Honor.

16 THE COURT: Mr. Escano, any objection?

17 MR. ESCANO: No objections.

18 THE COURT: Ms. McKinney, I recognize this was a  
19 huge burden on you. I wish you safe travels back to  
20 Louisville and I hope you enjoyed Las Cruces for the time  
21 you were here.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you, ma'am. You're excused.

24 All right. So we've been going at this for three  
25 and a half hours. The first question is how long do we

1 anticipate the direct examination of Mr. Escano, as part of  
2 the defendants' case, to take?

3 MR. MEADOWS: Your Honor, my best estimate would  
4 be in the range of an hour or 90 minutes.

5 THE COURT: Okay. Mr. Escano, do you have any  
6 notion yet of how long your cross-examination of yourself  
7 will be? And I've told you that will be in the form of  
8 narrative testimony from the witness stand.

9 MR. ESCANO: Maybe 20 minutes.

10 THE COURT: Okay. So we've got a hard stop with  
11 the court reporter. She has a 3:00 unbreakable engagement.  
12 We have a recording system that I'm perfectly comfortable  
13 using for oral argument. So if we have to divert to that  
14 for oral argument, that's fine, but I want witness testimony  
15 taken by her. So here's my proposal: Well, it's 12:25 on  
16 that clock back there.

17 (Discussion off the record.)

18 Well, apparently, the courtroom is not available  
19 after 2:00. So we've got to be done with the testimony at  
20 2:00. That means that we're going to take a break until  
21 12:40 on that clock. So it's about a 14-minute break, so  
22 we'll be in recess until then.

23 (A recess was taken.)

24 THE COURT: Okay. We are back on the record.  
25 Sorry about the change of venue. We had diverted upstairs

1 because this room doesn't have the document camera, and you  
2 guys didn't even use the document camera, so that change of  
3 venue was unnecessary. And I didn't know that we were  
4 bumping into a guilty plea docket, so we were going to start  
5 getting people in custody into that room and it was going to  
6 be a disaster, so my apologies. But we're ready now. And  
7 our time pressure has been relaxed, so don't feel like we  
8 have that anymore.

9 Mr. Meadows, you may call your next witness.

10 MR. MEADOWS: Thank you, Your Honor. We call  
11 Ruben Escano.

12 THE COURT: Mr. Escano, please come forward.

13 MR. ESCANO: Am I allowed to bring papers, by any  
14 chance?

15 THE COURT: Not normally, but if you're going to  
16 need them for your narrative testimony --

17 MR. ESCANO: Yeah.

18 THE COURT: -- then you may bring them.

19 MR. ESCANO: Okay.

20 **RUBEN ESCANO,**

21 After having been first duly sworn, did make the  
22 following answers:

23 **DIRECT EXAMINATION**

24 THE COURT: Have a seat.

25 MR. MEADOWS: And, Your Honor, before we get

1 started, I think we're on the same page about this, but just  
2 in case, do we have permission to treat Mr. Escano as a  
3 hostile witness even though we're calling them on direct?

4 THE COURT: You know, I was thinking about that.  
5 Let me just make a finding. Give me one second.

6 He hasn't shown hostility yet, but he may be an  
7 adverse witness under Rule 611. So, actually, I'll speak  
8 more clearly: Under Rule 611, Subsection (a) -- correction,  
9 Subsection (c) (2), I'm going to permit leading questions  
10 because Mr. Escano is an adverse party. So that's the  
11 Court's finding.

12 So, Mr. Escano, Mr. Meadows will be asking you  
13 leading questions. And if he chooses to, he can ask  
14 open-ended questions, but he's permitted to ask leading  
15 questions.

16 MR. ESCANO: Yes, sir.

17 MR. MEADOWS: Thank you, Your Honor.

18 Q. (BY MR. MEADOWS): Mr. Escano, you contend in  
19 this case that the defendant hid the issue of backup  
20 withholding from you, don't you?

21 A. They never brought it up until they told me they were  
22 sending a check.

23 Q. Well, I'm actually quoting from a brief that you filed  
24 in this case in your motion to void filed with this Court.  
25 And I quote, you wrote (reading), "Defendants hid the issue

1 of backup withholding" from you. You stand by that, don't  
2 you?

3 A. They hid the issue that they were going to reduce the  
4 settlement payment by the amount they did.

5 Q. Well, what you wrote, again, was that the issue of  
6 backup withholding was hidden from you; is that a true  
7 statement?

8 A. I stand by everything I've written in the briefs.

9 Q. And just to be clear, you filed a number of briefs in  
10 this case, correct?

11 A. I had to.

12 Q. And you wrote them all yourself, right?

13 A. Yeah -- yes.

14 Q. And so all the words in the briefs that you filed are  
15 your words?

16 A. Except for quotes and things like that.

17 Q. Sure, except for things that you're quoting,  
18 everything else, you wrote?

19 A. Yes.

20 Q. Now, getting back to your statement that the  
21 defendants hid the issue of backup withholding from you,  
22 now, when you signed the settlement agreement on May 3<sup>rd</sup>  
23 of 2023, you were very familiar with the concept of backup  
24 withholding, right?

25 A. No -- wait. What's the date?

1 Q. May 3, 2023.

2 A. Was that before or after?

3 Q. That's the date you signed the settlement agreement.

4 A. I don't think I was aware of it.

5 Q. You were not aware of the issue of backup withholding?

6 A. Maybe at some point I had heard of it but, I mean, I'm  
7 not a tax expert and certainly I had no reason to believe  
8 that the settlement payment would be reduced by the amount  
9 it was.

10 Q. Well, let's stick with the issue of backup withholding  
11 specifically for purposes of my questions, because in one of  
12 your declarations, you said that (reading), "On the  
13 April 12<sup>th</sup>, 2023, phone call, Mr. Terepka said that  
14 providing a Form W-9 was an IRS requirement and he  
15 referenced IRS publications, including the instructions on  
16 Form W-9." Do you recall that?

17 A. I remember him -- are you asking me if I recall filing  
18 the declaration or if I recall the phone call?

19 Q. Well, do you recall saying that in your declaration?

20 A. Yeah, I think I recall it. Yeah.

21 Q. And it was a true statement when you said it, right?

22 A. Yeah.

23 Q. And it's a true statement today, correct?

24 A. Yes.

25 Q. And Mr. Terepka not only told you about the issue --



1 or told you his view that a Form W-9 was an IRS requirement  
2 and he pointed you specifically to the Form W-9, itself, and  
3 the instructions included with it? Right?

4 A. Mr. Terepka is opposing counsel. He is not my  
5 attorney, as he said several times in e-mails and writing.  
6 I don't see why I should take anything that he says --  
7 respectfully, of course, anything that he says as a  
8 representative of an opposing -- as opposing adversary to be  
9 legally true or true in any sense.

10 Q. Well, I'm not asking you how you took it. I'm just  
11 asking whether he said it. On the April 12<sup>th</sup> phone call,  
12 he told you specifically about form W-9 and referred you to  
13 the instructions of that form, correct?

14 A. I don't remember the date, but if you're saying it's  
15 in the declaration, then the date's probably true.

16 As far as what he said, he did say it was -- he  
17 did say it was an IRS requirement and he cited -- I don't  
18 remember what he cited, but he probably cited an IRS form.

19 Q. Let me be even more specific. I'm looking now at a  
20 brief you filed -- I'm sorry, this is your response in  
21 opposition to defendants' motion to enforce the settlement  
22 filed on June 15<sup>th</sup>. I'm going to quote from page 7:

23 (Reading) "Moreover, during the April 12, 2023, phone call  
24 where plaintiff stated he would not provide a W-9,  
25 Mr. Terepka referenced some of the same IRS publications

1     cited in the motion, including the instructions on Form W-9,  
2     which includes an explanation of backup withholding."

3             Do you recall making that statement in your  
4     brief?

5     A.    If it's in there, then I made it.

6     Q.    If it's in there, then it's accurate, right?

7     A.    And -- yes, but I should add this was during a phone  
8     call, so it's not like he cited it specifically, but he did  
9     mention these forms.

10    Q.    So as of April 12<sup>th</sup>, at the absolute latest, you  
11    were pointed to the very instructions that describe backup  
12    withholding that you now claim were hidden from you?

13    A.    I don't recall ever even seeing the word "backup  
14    withholding" in any of those forms. I don't even recall if  
15    I spent much time looking at those forms because, again,  
16    Mr. Terepka is opposing counsel. And most of the  
17    instructions are -- it's fine print and the word "backup  
18    withholding" is buried in that form somewhere, and I only  
19    became aware of it during briefing.

20    Q.    Well, now, Mr. Escano, you're a very accomplished  
21    legal researcher, aren't you?

22    A.    I wouldn't say that, no.

23    Q.    Is it not true that, within the last two years, alone,  
24    you've filed at least seven lawsuits in New Mexico?

25    A.    I've filed claims under a constitutionally mandated

1 right for a small fraction of the over a thousand calls,  
2 telemarketing calls, I receive on my phone per year.

3 Q. My question is you've filed at least seven lawsuits  
4 over the last two years in New Mexico, alone, right?

5 A. I don't know the exact number, but that sounds about  
6 right.

7 Q. Sounds about right. And I've read your briefs in this  
8 case. They're very well written. Where did you learn how  
9 to do that?

10 A. Do what?

11 Q. Write briefs that are the equivalent of an experienced  
12 lawyer?

13 A. I...I don't know.

14 Q. Well, and even more to the point, I mean, your briefs  
15 have very professional looking tables of authorities citing  
16 to cases and statutes, correct?

17 A. It's usually a requirement to cite cases and statutes.

18 Q. And you read all of the cases and statutes you cite in  
19 your briefs, don't you?

20 A. Generally, yeah.

21 Q. So you're perfectly capable of reading legal texts and  
22 legal statutes, right?

23 A. When I think they are relevant, yes.

24 Q. Did you not think that IRS Form W-9 was relevant when  
25 Mr. Terepka pointed you to it in April?

1       A.    I did not think it was relevant after he said his  
2       client would not need a W-9.

3       Q.    Let me go ahead and show you what's been admitted as  
4       Defendants' Exhibit 18.  Do you recognize Exhibit 18,  
5       Mr. Escano?

6       A.    This looks like an IRS W-9 form.

7       Q.    Have you ever seen the IRS W-9 form before today?

8       A.    Yes, I have.

9       Q.    Had you ever seen IRS W-9 form before you signed the  
10       settlement agreement in this case?

11       A.    Yeah.  Not related to this case, but -- oh, wait.  I  
12       see what you're saying.  Yes.

13       Q.    Okay.  Just to be clear, because I'm not sure the  
14       record is clear right now, before you signed the settlement  
15       agreement in this case in early May of this year, you had,  
16       in fact, seen IRS Form W-9, which is now in front of you as  
17       Defendants' 18?

18       A.    I'm pretty sure, yes.

19       Q.    All right.  Now, let's get back to this issue of  
20       backup withholding and whether it was hidden from you.  Do  
21       you see, on the first page of Exhibit 18, bottom right-hand  
22       corner, there's some italicized print that begins with "if  
23       you do not"?

24       A.    All the way at the bottom in the fine print there?

25       Q.    Yeah.

1 A. "If you do not" --

2 Q. Could you read that?

3 A. (Reading) "If you do not return Form W-9 to the  
4 requester with a TIN, you might be subject to backup  
5 withholding. See What is backup withholding, later."

6 Q. You understand -- you read that as "TIN." You  
7 understand that refers to "Taxpayer Identification Number,"  
8 correct?

9 A. Yeah.

10 Q. Now, that statement in the W-9 that you just read, had  
11 you read that before you signed the settlement agreement?

12 A. I don't believe so.

13 Q. Well, let me ask you, the last part of the statement  
14 you read referred to "see What is backup withholding,  
15 later." And, sure enough, on page 2, do you see the entry  
16 for backup withholding?

17 A. You're on page 2?

18 Q. Yes.

19 A. Yes, I've seen this before.

20 Q. Okay. And this part that references backup  
21 withholding, had you seen this before you had seen the  
22 settlement agreement?

23 A. I don't think so, not before the settlement agreement.

24 Q. All right.

25 A. I think it was on briefing, I'd probably seen it cited

1       somewhere.

2       Q.     Would you please read what it says there right next to  
3       the question, "What is backup withholding?"

4       A.     It says (reading), "Persons making certain payments to  
5       you must, under certain conditions, withhold and pay to the  
6       IRS 24 percent of such payments. This is called 'backup  
7       withholding.'"

8       Q.     All right. Thank you. Now, is it your testimony  
9       that, when you signed the settlement agreement in this case,  
10      you hadn't read that?

11      A.     I don't think we discussed backup withholding at all  
12      before we signed the settlement agreement.

13      Q.     Well, except that Mr. Terepka, you just admitted,  
14      pointed you to this very form. So I'm asking, just to  
15      clarify, you never read this statement in Form W-9 about  
16      backup withholding before signing the settlement  
17      agreement --

18      A.     It's --

19      Q.     -- did you?

20      A.     -- a six-page document with a bunch of fine print. I  
21      did not read the entire document.

22      Q.     I'm not asking about the entire document right now. I  
23      want to be clear: This part about backup withholding, did  
24      you read that before you signed the settlement agreement?

25      A.     I don't think I read it. I don't think we discussed

1 backup withholding at all.

2 Q. Well, given that you admit that Mr. Terepka referred  
3 you to this form and, as we can now see, the form is very  
4 clear about what backup withholding is and when it's  
5 required, would you agree with me that nothing about backup  
6 withholding was hidden from you?

7 A. I would not agree with that at all. I mean, even  
8 pointing out --

9 Q. There's no question pending, but thank you.

10 A. All right.

11 Q. You've also testified in this case, I should say  
12 through a declaration, that (reading) "When I executed the  
13 settlement agreement based on lengthy conversation I had  
14 with Mr. Terepka, I believed I would not be required to  
15 provide a W-9 or be affected by any supposed tax  
16 requirements concerning the defendants." Does that sound  
17 familiar you to?

18 A. It sounds familiar. I don't have it in front of me,  
19 but it sounds familiar.

20 Q. It's in your declaration that you filed in opposition  
21 to the motion to enforce the settlement.

22 And, in that statement, you don't -- you  
23 mentioned a W-9, but you don't mention backup withholding  
24 because, I think as you've already testified, you and  
25 Mr. Terepka never discussed the issue of backup withholding

1 at all, right?

2 A. I'm pretty sure that's why this whole thing is an  
3 issue.

4 Q. All right. The settlement agreement we're talking  
5 about here today isn't the first settlement agreement you've  
6 negotiated, is it?

7 A. It's not the first, no.

8 Q. It's not the first settlement agreement you've entered  
9 into, right?

10 A. Correct.

11 Q. It's fair to say that you're a very experienced  
12 litigant, isn't it?

13 A. I wouldn't say that.

14 Q. Well, we already talked about the seven lawsuits you  
15 filed here in New Mexico in the last two years, alone.  
16 You've filed other lawsuits besides those, haven't you?

17 A. Other than the ones that are in New Mexico?

18 Q. Other than the ones in New Mexico over the last  
19 two years.

20 A. I filed -- yes, I have filed other cases.

21 Q. You've filed several cases in the state of Vermont?

22 A. Correct, yeah.

23 Q. Where else have you filed lawsuits?

24 A. Those are the only ones.

25 Q. No cases in California?



1 A. Oh, there was a case in California, but I didn't  
2 pursue that case.

3 Q. What about a case in Utah?

4 A. There was a motion -- there is a current motion to  
5 enforce a subpoena in Utah. It's not really a TCPA case,  
6 but, yeah, that was filed just a couple of months ago.

7 Q. That was a motion you filed to enforce a subpoena,  
8 correct?

9 A. Yeah.

10 Q. So, certainly, you've litigated in multiple states?

11 A. Yeah, you could say that.

12 Q. And you've represented yourself in all of those cases,  
13 right?

14 A. Correct, yeah.

15 Q. In fact, you even appealed one of those cases to the  
16 Tenth Circuit Court of Appeals?

17 A. I did, yeah.

18 Q. And you were partially successful on that appeal,  
19 weren't you?

20 A. Yeah. Depends on how you look at it, but there was a  
21 win in that case, yes.

22 Q. I'm sorry. There was a win?

23 A. Partial win.

24 Q. Partial win?

25 A. But --

1 Q. And, by the way, the lawsuits that you've been filing  
2 here in the state of New Mexico, those are often against  
3 out-of-state defendants, aren't they?

4 A. Generally telemarketers not based in New Mexico or  
5 Vermont, so yeah.

6 Q. And, oftentimes, those out-of-state defendants are  
7 hiring out-of-state counsel to oppose you, right?

8 A. Yes.

9 Q. In fact, in the cases you've got pending right now,  
10 you're up against K&L Gates in one case, right?

11 A. Yes.

12 Q. You're up against Bryan Cave in another case, right?

13 A. What case is that?

14 Q. I'm not sure which one. Do you recall, in one of your  
15 cases --

16 A. That sounds familiar.

17 Q. And the full name is Bryan Caves Leighon Paisner?

18 A. Sounds familiar.

19 Q. That's a case with Ben --

20 A. Yeah, I think one of the attorneys just moved to that  
21 firm, that's why I don't remember. I don't know, but that  
22 sounds familiar.

23 Q. And filing and pursuing all these different cases,  
24 Mr. Escano, must take up an awful lot of your time, doesn't  
25 it?

1 A. Unfortunately, it does.

2 Q. Do you make a living by pursuing these lawsuits?

3 A. I wouldn't say that, no.

4 Q. Do you make a living by settling these kind of  
5 lawsuits?

6 A. I wouldn't say that.

7 Q. Are the settlements of these lawsuits the primary  
8 source of your income?

9 A. Currently, yeah.

10 Q. How many lawsuits have you settled?

11 A. I mean, probably maybe around a dozen.

12 Q. And I take it that in all of those dozen cases that  
13 you've settled, you've received some sort of payment, right?

14 A. Correct, yeah.

15 Q. And just to be clear, despite having settled about a  
16 dozen cases and receiving a dozen payments, you've never  
17 read this language in Form W-9 that talks about backup  
18 withholding?

19 A. I did not read the whole six-page fine-print form, no.

20 Q. Again, just to be clear, not the whole six pages; the  
21 specific parts we read that relate directly to backup  
22 withholding --

23 A. I would only --

24 Q. -- you haven't read those?

25 A. I wouldn't read it unless there was a reason to read

1 it, and there has never been before this case.

2 Q. Are you employed right now, Mr. Escano?

3 A. I'm currently a student right now.

4 Q. Where are you a student?

5 A. I'm taking online computer science classes.

6 Q. Have you ever been employed?

7 A. Have I ever been employed?

8 Q. Yeah.

9 A. Yeah, of course.

10 Q. Were you a salaried employee while you were employed?

11 A. I don't think I've ever been salaried. Most of my  
12 jobs have been commissions. I have a background in sales.

13 Q. I'm sorry, most of your jobs have been what?

14 A. Have been commission-based.

15 Q. Have you ever received a paycheck from which some  
16 portion of your earnings were withheld as taxes?

17 A. Yeah.

18 Q. So you were familiar with the concept of withholding  
19 long before this settlement agreement ever came into being;  
20 is that right?

21 A. In the context of an employee/employer relationship  
22 and, you know, a pay stub, yeah.

23 Q. What's your education?

24 A. I have some college.

25 Q. Do you have any legal training at all?

1       A.    I took an undergrad class in -- here in New Mexico for  
2       just one semester.  It was a class in business law, and that  
3       was just to kind of -- that wasn't for any purpose other  
4       than just for curiosity.

5       Q.    I asked you earlier about some lawsuits you filed up  
6       in Vermont.  Were you a resident in Vermont at one point?

7       A.    I was, yeah.

8       Q.    How many lawsuits did you file in Vermont?

9       A.    I think it was probably three.

10      Q.    Does more like five sound like it?

11      A.    I mean, if there's a record of five, then probably  
12      five.  I only remember three, but there could be five.

13      Q.    When did you first file a lawsuit on your own behalf,  
14      representing yourself, pro se?

15      A.    2018 or 2017.

16      Q.    So approximately five or six years ago?

17      A.    Yes.

18      Q.    And you've been at this pro se filing of lawsuits  
19      continuously over the past five or six years, right?

20      A.    I wouldn't say continuously.  I mean, usually -- I  
21      usually file a case when it just becomes -- you know, the  
22      telemarketing calls become so annoying that I have to do  
23      something to get them to stop.

24      Q.    Let me ask you about the settlement agreement now that  
25      you signed in this case.  I presume you read that very

1 carefully before you signed it?

2 A. Yeah. I mean, we exchanged redlined documents, so  
3 yeah.

4 Q. Well, right. So you received drafts of the agreement  
5 from Mr. Terepka, right?

6 A. Yeah.

7 Q. You read those carefully, correct?

8 A. Yes.

9 Q. You made changes when you thought there were changes  
10 that should be made to the documents, correct?

11 A. Yes, yes.

12 Q. You didn't -- and you didn't hesitate to ask for  
13 whatever changes to those documents you thought were  
14 required, did you?

15 A. I wouldn't say so.

16 Q. You don't strike me as the kind of person who  
17 self-censors when it comes to protecting your own rights.  
18 Do you?

19 A. What do you mean by "self-censor"?

20 Q. Someone that if you think something is important to  
21 put in the settlement agreement that you'd ask for it.  
22 Because you're a very strong advocate for your own rights,  
23 aren't you?

24 A. Not necessarily. I mean, you can go on and on in the  
25 settlement and legalese and make sure you have every single

1 term battened down and it can go forever. There's got to be  
2 a point to stop.

3 Q. In this case, you had the opportunity to consult with  
4 legal counsel, if you chose to?

5 A. I wasn't forced in the settlement.

6 Q. Well, that's not my question. If you had wanted to  
7 hire an independent lawyer to help you with the settlement  
8 agreement, you certainly could have done that, right?

9 A. Was I given the opportunity? To answer your question,  
10 technically, not exactly. I mean, you'd have to find an  
11 attorney that you trust and that's competent enough to make  
12 sure you're doing the right thing. I've previously had a  
13 settlement that I had an attorney work on, you know, when I  
14 was in Vermont. And the advice I got was not that great.  
15 He seemed like a nice guy, but it seemed like he was giving  
16 me advice I already knew. So, to answer your question, was  
17 I given an opportunity? Yes, but, technically, would I be  
18 able to find a lawyer in a reasonable amount of time to  
19 review the contract with me? Probably not.

20 Q. Probably not. But you affirmed in the settlement  
21 agreement that the parties to this agreement have read and  
22 understand this agreement and have had the opportunity to  
23 consult with legal counsel in any negotiation, drafting, and  
24 execution of this agreement; although, plaintiff has  
25 declined to consult with legal counsel. You agreed to that

1 language?

2 A. Yes, of course.

3 Q. And, in fact, just before the signatures in all caps,  
4 in bold (reading) "Plaintiff affirms that he has had an  
5 opportunity to consult with an attorney prior to signing  
6 this agreement, but he has decided not to do so," that's in  
7 the agreement, too, right?

8 A. Yeah, if it's in the agreement, then it's in there.

9 Q. And you agreed to that language, right?

10 A. Yeah.

11 Q. And moreover, that language is accurate, correct?

12 A. Yeah.

13 Q. In your judgment, you didn't need the legal --

14 A. And just for the record, I don't have the contract in  
15 front of me right now.

16 Q. I understand. In your judgment, you didn't need legal  
17 counsel on this settlement agreement because you were  
18 perfectly capable of protecting your own rights, correct?

19 A. If you consider how it turned out, maybe I should have  
20 gotten an attorney.

21 Q. Maybe you should have, Mr. Escano. Thank you. But  
22 just to be 100 percent clear, you knew at all times that  
23 Mr. Terepka wasn't your lawyer, right?

24 A. Yeah. I said that earlier.

25 Q. In fact, you were clear. Earlier on in your



1 testimony, you said you couldn't trust anything he told you  
2 because he represented the defendants.

3 A. I wouldn't say trust anything, but trust anything in  
4 his capacity as a representative of his clients.

5 Q. And I think we talked about this statement in one of  
6 your briefs before, but just to be clear, you've contented  
7 here and written in your briefs that, with regard to the  
8 settlement agreement, you believed you would not be required  
9 to provide a W-9 or be affected by any supposed tax  
10 requirements concerning the defendants. Does that sound  
11 familiar? Doesn't it?

12 A. I was going off of what Mr. Terepka told me.

13 Q. But it was, in fact, your belief, when you signed the  
14 settlement agreement, that you wouldn't be, as you say,  
15 affected by any tax requirements that related to the  
16 defendants, right?

17 A. Based on representations by opposing counsel.

18 Q. And, in fact, in one of your declarations, you say  
19 that that belief was based on the lengthy conversations you  
20 had with Mr. Terepka; is that --

21 A. Yes.

22 Q. -- correct? Now, all of those lengthy conversations,  
23 by the way, occurred before you signed the settlement  
24 agreement, right?

25 A. Yes.

1 Q. And, in fact, I think, in one of your  
2 cross-examinations today, we've seen the email on  
3 April 25<sup>th</sup> from Mr. Terepka saying that the defendants can  
4 pay without a W-9. You know what I'm talking about, right?

5 A. I don't have it in front of me, but, yes, that's the  
6 main reason this is such a big problem.

7 Q. That's the centerpiece of your argument here today,  
8 isn't it?

9 A. It's the whole reason this is -- this is here.

10 Q. And, you know, we have agreed that that April 25<sup>th</sup>  
11 email was sent to you and received before the settlement  
12 agreement was signed, right?

13 A. Correct, yes.

14 Q. And, in fact, if my math is right, about a week before  
15 the settlement agreement was signed?

16 A. I don't have it in front of me, but that sounds about  
17 right.

18 Q. All right. Now --

19 A. Actually, sorry, if I may? That sounds like, I would  
20 say, maybe two weeks.

21 Q. Okay. Maybe even two weeks --

22 A. Okay.

23 Q. -- but certainly long before the settlement agreement  
24 was signed?

25 A. It was a couple of weeks before. Approximately.

1 Q. So at any point -- and, again, over that same time,  
2 you and Mr. Terepka were exchanging draft agreements, right?

3 A. Yes.

4 Q. You had every opportunity to say, "Hey, add the  
5 substance of that April 25<sup>th</sup> email to the settlement  
6 agreement," didn't you?

7 A. It was -- that component of the W-9 was already  
8 incorporated very clearly in at least three separate  
9 instances of the...of the contract.

10 Q. All right. We'll get to this more in a minute, but  
11 you know as well as I do the word "W-9" doesn't appear  
12 anywhere in that settlement agreement, does it?

13 A. I don't think it does.

14 Q. The words "backup withholding" don't appear anywhere  
15 in that settlement agreement, do they?

16 A. Also didn't appear in our discussions.

17 Q. Well, getting back to your lengthy discussions with  
18 Mr. Terepka that we talked about and the April 25<sup>th</sup>  
19 email -- and just to be clear, you never asked, "Hey, if  
20 you're telling me you can pay without a W-9, Alex, put it in  
21 the agreement"? Never came up, did it?

22 A. We never put it in the agreement.

23 Q. And the same thing, if you had any expectation at all  
24 about backup withholding, you didn't ask for that to be put  
25 in the agreement, either, did you?

1 A. We didn't discuss backup withholding.

2 Q. All right. Now, you also know that that April 25<sup>th</sup>  
3 email you received from Mr. Terepka is not part of the  
4 settlement agreement, don't you?

5 A. Under New Mexico common law, it is, yeah.

6 Q. Oh, you think it is?

7 A. I believe it is.

8 Q. Did you not agree in the settlement agreement that the  
9 agreement itself was the entire agreement between the  
10 parties and that you weren't relying on anything that was  
11 outside its four corners?

12 A. Just like we don't rely on fine-print instructions on  
13 an IRS Form W-9.

14 Q. I'm sorry. Could you repeat that?

15 A. Just like we don't rely on fine-print instructions on  
16 IRS Form W-9.

17 Q. Well, what you're calling "fine print," I mean, those  
18 are instructions from the IRS, itself, right?

19 A. Regarding what?

20 Q. Regarding the very issues we're here to talk about  
21 today: W-9s and backup withholding.

22 A. I'm not a tax attorney. And I don't think the law  
23 actually supports that, Mr. Meadows.

24 Q. Well, if you had read the W-9 before signing the  
25 agreement -- well, you might not have even signed the

1 agreement if you had read it, right? You would have known  
2 at that point, "Hey, I'm headed into it -- if I don't give  
3 them this W-9, I'm heading in a situation where I'm not  
4 going to get the full amount of the settlement agreement"?

5 A. Can you repeat the question?

6 Q. Yeah. If you had read the Form W-9 and all the  
7 instructions we just looked at, you would have known, "If I  
8 don't provide a W-9 to the defendants, I'm not going to get  
9 the whole settlement payment," right?

10 A. Are you asking me if I had read --

11 Q. Yeah, if you had read it, you would have been fully  
12 informed that a backup withholding was going to be the  
13 inevitable consequence of your refusal to give a W-9,  
14 correct?

15 A. If I had read it, I don't even think that would be  
16 true.

17 Q. So you would have proceeded with the settlement  
18 anyway, despite what the W-9 instruction said; is that your  
19 testimony?

20 A. Sounds like a lot of speculation to me.

21 Q. Oh, okay.

22 Well, let's get -- getting back to my question  
23 that kind of led us into that, you're aware that the  
24 settlement agreement has a Section 14, a merger and  
25 integration clause, right?

1 A. I don't have it in front of me. It sounds familiar,  
2 but I don't -- I don't really recall.

3 Q. You know what a merger clause is in a contract, right?

4 A. Not off the top of my head right now.

5 Q. No, after despite having settled a dozen different  
6 cases, don't know what a merger clause is?

7 A. If it was in front of me, I could probably refresh my  
8 memory.

9 Q. All right. Well, it might be up there. I don't know  
10 if we have the exhibits up there in front of you. It's  
11 Defendants' Exhibit 1.

12 THE COURT: And Plaintiff's Exhibit 1.

13 A. And what section is it?

14 Q. Section 14.

15 A. Okay.

16 Q. It's on page 4.

17 A. Oh, I see. Yes, I understand what you're talking  
18 about.

19 Q. And you're familiar with this Section 14 in the  
20 settlement agreement, right?

21 A. Yeah.

22 Q. The first sentence of that section says (reading),  
23 "This agreement constitutes the full and final settlement  
24 and release of the released claims and contains the entire  
25 agreement between the parties with respect to the

1 subject" -- I'm sorry -- "with respect to the settlement  
2 addressed herein."

3 A. I see that.

4 Q. Do you see that?

5 So you understood that this settlement agreement  
6 was it; this was the whole deal between you and the  
7 defendants and there was nothing more to it, right?

8 A. Not necessarily.

9 Q. No? So -- and, by the way, in all of the previous  
10 cases you've settled, there were written settlement  
11 agreements, right?

12 A. In some of them, yes.

13 Q. Some of them?

14 A. Sorry. In the ones I've settled, yes, there were  
15 settlement agreements.

16 Q. Right. How many of those settlement agreements  
17 contained a merger clause saying that the written settlement  
18 agreement is the whole agreement between the parties?

19 A. I've seen it before.

20 Q. Probably in all of them, right?

21 A. I can't recall, but probably.

22 Q. And this is a pretty -- you know that this is a very  
23 standard provision of a settlement agreement, don't you?

24 A. I don't know that.

25 Q. You were also aware of Section 16 when you signed the

1 settlement agreement, right?

2 A. If it's in there and I signed it, yes.

3 Q. You were not only aware of it, but you had read it  
4 before you signed the settlement agreement?

5 A. Yes. I did read the agreement beforehand, yes.

6 Q. The first sentence of Section 16 says (reading),  
7 "Plaintiff affirms that the only considerations he received  
8 for entering into this agreement is stated herein and that  
9 no other promise, representation, or agreement of any kind  
10 has been made to or relied upon by plaintiff in connection  
11 with his execution of this agreement." Do you see that?

12 A. Yes.

13 Q. It's a true statement, right, as far as you're  
14 concerned?

15 A. I was under the impression from that section that the  
16 amount in Section 2 of this contract will be coming to me  
17 and there would be no reason for me to think otherwise.

18 Q. That's not my question, though, Mr. Escano. That  
19 sentence of Section 16 starts off with, "Plaintiff affirms";  
20 do you see that?

21 A. Yes.

22 Q. So you understood from that language that you were  
23 making an affirmation that something is true, correct?

24 A. Yes.

25 Q. And part of what you were affirming to be true was



1     that you had not relied upon any promise or representation  
2     that was made outside of the agreement, itself, right?

3     A.     From that section -- I read that to mean I'm not  
4     getting anything more than what's explicitly described in  
5     black letter in Section 2 of this agreement.

6     Q.     You agree with me that Section 16 doesn't even mention  
7     Section 2, does it?

8     A.     It's in the contract.

9     Q.     Well, it's in the contract, but Section 16 is not  
10    limited to Section 2, is it?

11    A.     So you're saying I would be getting more than what's  
12    listed in Section 2?

13    Q.     No, no, no. What I'm asking is, when you signed the  
14    settlement agreement, based on the language in Section 16,  
15    you affirmed that you weren't relying on any statement,  
16    promise or representation other than what was made in this  
17    agreement, itself, right?

18    A.     I affirmed that I would not be receiving anything more  
19    than what's listed in -- what's indicated in the contract.

20    Q.     What you affirmed in Section 21 -- I'm sorry, in  
21    Section 16 was that you were not relying on any statement  
22    made to you outside the agreement; for instance,  
23    Mr. Terepka's April 25<sup>th</sup> email, right? You were affirming  
24    that you were not relying on that email?

25    A.     That wasn't my intent.

1 Q. Well, whether it was your intent or not, that's what  
2 you agreed to, isn't it?

3 A. I read that -- I read this clause and any clause like  
4 it to mean plaintiff -- or any party is not getting any more  
5 than what's listed in the contract.

6 Q. And moving back up to Section 14 briefly, the last  
7 sentence of Section 14 -- we just talked about it a  
8 few minutes ago -- (reading) "This agreement supersedes all  
9 prior agreements and understandings between plaintiff and  
10 defendants and the released parties regarding the subject  
11 matter discussed herein." You were aware of that statement  
12 when you signed the agreement, weren't you?

13 A. What section are we on?

14 Q. 14, last sentence of 14.

15 A. I read this statement, yeah.

16 Q. And so there, you were agreeing that whatever  
17 understanding you may have had in your head about what any  
18 of this meant or what the deal was, that was superseded by  
19 the words on the page of this settlement agreement, correct?

20 A. When I read I'm getting a certain amount in Section 2,  
21 based on the sections that you are questioning me on, I  
22 believed that the amount in Section 2 was not going to  
23 increase and I could not ask for any more. And that was  
24 very reasonable.

25 Q. And, by the way, Section 2 doesn't say you're going to

1 get a certain amount net of taxes, does it?

2 A. I'll turn to it. Let's see, I mean, I don't think it  
3 does. I don't think it mentions taxes in Section 2.

4 Q. Right.

5 A. It mentions taxes in another section of the contract.

6 Q. We'll get to that in just a minute, but, for now,  
7 Section 2 doesn't say anything about you getting any  
8 particular amount of amount net of taxes?

9 A. It doesn't need to.

10 Q. Well, I guess, in hindsight, Mr. Escano, you could  
11 have put language in there to that effect, if that's what  
12 you really understood, right?

13 A. I could put a lot of language in a contract. It can  
14 go on forever.

15 Q. This could be another example, if you had hired a  
16 lawyer, you might have actually done that and put in Section  
17 2, "I want this amount net of taxes," right?

18 A. I'm not a lawyer, so I don't know. In the  
19 conversation I had with the previous lawyer I talked to a  
20 few years back, I don't think we discussed that at all.

21 Q. Whoever that previous lawyer was, he had nothing at  
22 all to do with the settlement agreement we're talking about  
23 today.

24 A. No, no, no. I think you're talking about my  
25 impression of the kind of legal advice I could get and what

1 that legal advice would be. So I'm just saying that it is  
2 likely that that would not be the case, that I would change  
3 that.

4 Q. You mentioned Section 5 a few moments ago, and I  
5 wanted to ask you about that.

6 Section 5 contains two agreements that you were  
7 making, correct?

8 A. I don't understand what you mean.

9 Q. Well, let's take each sentence separately. Section 1  
10 starts with (reading), "Plaintiff agrees," and then goes on  
11 to say, "The released parties make no warranty or  
12 representation about plaintiff's tax liability for the  
13 settlement payment," correct?

14 A. That looks like what it says, yeah.

15 Q. So you understood that sentence to mean that you were  
16 agreeing that the defendants hadn't told you anything about  
17 your tax liability for the settlement payment, correct?  
18 They made no representation to you about that?

19 A. About my tax liability?

20 Q. Right. They didn't say anything to you about that one  
21 way or the other, right?

22 A. We agreed that I was the one responsible for all of my  
23 taxes.

24 Q. Well, the second sentence also says that (reading),  
25 "Plaintiff agrees that he is fully and solely responsible

1 for any and all of his own tax liabilities with respect to  
2 the settlement payment," correct?

3 A. Yeah.

4 Q. That's an agreement that you made, right?

5 A. Under this section in the contract, as a whole, I did  
6 not think taxes would be an issue.

7 Q. You didn't think taxes would be an issue, but you  
8 didn't ask the defendants -- defendants to agree that taxes  
9 wouldn't be an issue, did you?

10 A. We did agree.

11 Q. No, no. In the settlement agreement there, you would  
12 agree with me there is no representation anywhere in here by  
13 the defendants that there will be no tax withholding, right?

14 A. The contract I do not think explicitly mentions W-9 or  
15 backup withholding; however, it does say that there is a sum  
16 certain amount of money that will be coming to me. And I  
17 was under the impression that that amount of money would be  
18 coming to me, especially after we had discussed the issue of  
19 W-9.

20 Q. You first learned that there would be a backup  
21 withholding deducted from the settlement payment through  
22 Mr. Terepka's letter to you on May 12<sup>th</sup>, correct?

23 A. That sounds about right, yeah.

24 Q. Do you recall saying in one of your declarations that  
25 you were veritably shocked by that letter?

1 A. I was.

2 Q. That's an accurate description of how you felt at the  
3 time, right?

4 A. That's very accurate.

5 Q. I mean, the news that there was going to be a backup  
6 withholding from your settlement payment made you angry?

7 A. It did not make my angry.

8 Q. Didn't you call Mr. Terepka right away when you got  
9 that letter?

10 A. I did.

11 Q. You put down everything else you might have been doing  
12 and called him back?

13 A. I might have been about to eat breakfast, yeah.

14 Q. So you put breakfast aside for a time to make a phone  
15 call about the letter?

16 A. I was shocked.

17 Q. Uh-huh. And in that call, you accused Mr. Terepka of  
18 stealing from you, didn't you?

19 A. I didn't say that.

20 Q. You called them a "thief," didn't you?

21 A. I didn't use the word "thief."

22 Q. You said, "You've stolen from me," didn't you?

23 A. No, sir.

24 Q. You threatened him?

25 A. No.

1 Q. Didn't you threaten him and say, "Do you know what  
2 someone like me, who sues for telephone calls, will do to  
3 someone who steals from them?"

4 A. I was veritably shocked.

5 Q. The quote that I just said, you said something very  
6 close to that, didn't you?

7 A. I did.

8 Q. Don't you think he would have taken that as a threat?

9 A. No.

10 Q. What did you have in mind when you told him, "What do  
11 you think someone like me is going to do to you"? What did  
12 you have in mind?

13 A. They had reduced the payment by quite a bit.

14 Q. You were going to make them pay for that by ramping up  
15 this litigation, weren't you?

16 A. No.

17 Q. Isn't that what you did?

18 A. What do you mean by "ramping up litigation"?

19 Q. Filing unnecessary motions.

20 A. Motions for what?

21 Q. Motion to void the settlement, seeking a default  
22 judgment, emailing them on Friday afternoons, threatening  
23 them, things like that. That's what you had in mind, isn't  
24 it?

25 A. No, and I should have had -- I wasn't even angry. The

1 day before, I had a conversation with another attorney in  
2 another case, an unrelated case. And I was calm, relaxed  
3 and was -- but there was a point of contention in that phone  
4 call. And that attorney had shouted at me, used profanity  
5 against me. And so I left that phone call with the  
6 understanding that perhaps litigators just, when they want  
7 something or when they're upset, they express that --  
8 litigators have a different language than normal people.

9 Q. Well --

10 A. And I don't consider myself a litigator, but what I'm  
11 saying is that, if I want to convey -- and I wasn't angry.  
12 I don't really get angry, but if I want to convey something  
13 to someone, I figured what's the best way to convey my shock  
14 to Mr. Terepka? So -- and so I gave him that phone call. I  
15 wasn't angry and there were no threats.

16 Q. Well, whether you said it calmly or angrily, you said  
17 to him something very close to the effect of, "Do you know  
18 what someone like me is going to do to you?"

19 A. Oh, no. I agree I said that very sternly.

20 Q. Yeah.

21 A. But I'm saying I wasn't angry. I wanted Mr. Terepka  
22 to be under the impression that I was angry. I was shocked,  
23 but I wanted him to be under the impression that I was  
24 angry.

25 Q. That April -- I'm sorry. That phone call, that



1 May 12<sup>th</sup> phone call, that wasn't the only time you  
2 threatened Mr. Terepka, is it?

3 A. I never threatened Mr. Terepka.

4 Q. Never? Don't you recall threatening to sue him in New  
5 Mexico State Court?

6 A. Oh --

7 Q. Yeah, did you forget about that?

8 A. No, I didn't forget about that. I don't consider that  
9 threatening someone. I mean, they have -- the opposing side  
10 has lied to me and put me under the impression that I would  
11 have a certain settlement amount to me in a specified period  
12 of time. Everything was going perfectly fine, our  
13 discussions were fantastic but, at the last minute, at the  
14 11<sup>th</sup> hour, for whatever reason, things changed. And so,  
15 you know, filing a motion to enforce that he did was  
16 consternating to me. It doesn't make any sense. I mean, I  
17 could see why, in the grand scheme of things, but the  
18 agreement was never fulfilled on the other side's end.

19 Q. Well, just to be clear, you knew that, when the  
20 defendants filed their motion to enforce the settlement, the  
21 Court had allowed them to do that, right?

22 A. Yes. And that was because of a notice that was signed  
23 by Mr. Terepka where he -- it was a three-page notice. He  
24 explained the issue of a W-9. He said, if I remember  
25 correctly, "Plaintiff is unhappy that he is required to

1 provide a W-9," but nowhere in that notice was there any  
2 mention that we had agreed no W-9 would be required. So  
3 anyone looking at that, even me, if I was looking at that, I  
4 would say, "This is ridiculous. It sounds like something  
5 ridiculous is going on."

6 Q. And your response to the defendants' motion to enforce  
7 the settlement agreement was to sit down, write a three-page  
8 letter to Mr. Terepka and Mr. Barcala by starting off, "If  
9 you don't withdraw this motion, I'm going to sue both of you  
10 in New Mexico State Court," right?

11 A. Yeah, yeah.

12 Q. And, "I'm not going to just sue you guys; I'm going to  
13 sue your whole law firms down here," right?

14 A. I referenced the issue of malicious abuse of process  
15 because I read many cases on the issue. There is a firm  
16 legal -- a firm legal basis to file claims against attorneys  
17 who file these kinds of frivolous motions that aren't based  
18 on any kind of fact.

19 Q. Of course, you never actually filed a motion -- I'm  
20 sorry, filed a lawsuit against them for malicious abuse of  
21 process, did you?

22 A. I reserve the right to do so.

23 Q. Oh, even as we sit here today, you're still thinking  
24 about it?

25 A. I'm not thinking about it, but the only reason I

1 haven't is because, I mean, there's been a bunch of motions  
2 in this case that I've had to spend time on and I have to  
3 limit my time somewhere.

4 Q. And once you get enough time, you're going to go ahead  
5 and sue Mr. Terepka down here?

6 A. Not necessarily.

7 Q. But maybe you might?

8 A. No. If everything gets resolved, I mean...

9 Q. Oh, so, if you win today, then you won't sue  
10 Mr. Barcala and Mr. Terepka. But if you lose, you're going  
11 to sue them; is that your testimony?

12 A. That's a discussion that we had. That why I sent the  
13 letter. There is a firm legal basis for malicious abuse of  
14 process. It's not pulled out of a hat. It's cited in my  
15 letter.

16 Q. Now, after you sent the letter threatening to sue  
17 them, didn't you realize that it's something you shouldn't  
18 have sent? You shouldn't have done that?

19 A. No.

20 Q. "No"? Don't you recall sending Mr. Terepka and  
21 Mr. Barcala a separate email saying, "You need to treat my  
22 letter threatening to sue you as confidential"?

23 A. I did say that, yeah.

24 Q. Yeah, and you said, "If you do treat it as  
25 confidential, I'm going to deem all of the allegations in my

1 complaint as admitted." You said that, too, right?

2 A. Yeah, I said that.

3 Q. Right. You wanted to cover that letter up. You  
4 didn't want this Court to ever see that letter, did you?

5 A. That's not true.

6 (Discussion off the record.)

7 Q. I'm happy to hand you some water, Mr. Escano. While I  
8 was there, I also handed you Defendants' Exhibit 13.

9 Do you recognize Exhibit 13?

10 A. Yes.

11 Q. And it's two e-mails?

12 A. It's two what?

13 Q. The email at the bottom is from you to Mr. Terepka,  
14 Barcala and Clifford Atkinson on June 28<sup>th</sup> of this year,  
15 correct?

16 A. Sorry. Can you say that again?

17 Q. Yeah. The email on the bottom of Exhibit 13 is an  
18 email from you to Mr. Terepka, Barcala, and Atkinson on  
19 June 28<sup>th</sup> of this year, yes?

20 A. Oh, yes.

21 Q. Do you see in the subject line? It references a  
22 malicious abuse of process.

23 A. Yes.

24 Q. So that's a reference to the threat to sue them for  
25 malicious abuse of process that you had made, correct?

1     A.    I wouldn't call it a threat, but, yes, I did inform  
2     them that there was a firm legal basis for malicious abuse  
3     of process claim, based on our discussions prior to the  
4     settlement agreement where Mr. Terepka said that a W-9 would  
5     not be required.

6     Q.    And that email, Exhibit 13, that we're looking at is  
7     the email through which you demanded that Mr. Terepka,  
8     Barcala, and Atkinson treat your threat to sue them as  
9     confidential, correct?

10    A.    Yes.

11    Q.    Now, the same day that you received notice -- or  
12    Mr. Terepka's letter informed you that there would be a  
13    backup withholding on May 12<sup>th</sup>, he asked you again if you  
14    would reconsider your refusal to provide a W-9; do you  
15    recall that?

16    A.    What are you looking at now?

17    Q.    I'll show you.  It's Defense Exhibit 3, which you  
18    should have in front of you.  And if you'll look at the --  
19    and I apologize, again, but there are no page numbers.  But  
20    if you'll look at what I believe is the third page.  At the  
21    top, you'll see there's an email that says (reading), "No  
22    W-9."

23    A.    Defendants' Exhibit 3?

24    Q.    Yes.

25    A.    And what is the date of the email?

1 Q. It's May 12, 2023. And the one I'm interested in is  
2 time stamped 1:02 P.M.

3 A. This is an email from me or to me?

4 Q. The one that I'm referring to is about in the middle  
5 of that page. And it's from Mr. Terepka to you on May  
6 12<sup>th</sup>.

7 A. Got it.

8 Q. You with me?

9 A. Yeah.

10 Q. Good. Again, this is sent at 1:02 P.M. This is after  
11 your phone call with Mr. Terepka that morning, correct?

12 A. Yes.

13 Q. Right. Because you said you were about to eat  
14 breakfast when you called him, so it must have been early in  
15 the morning, right?

16 A. Yeah. This may be -- is this time Georgia time, the  
17 1:02?

18 Q. Good question. I'm not exactly sure, but, in any  
19 event, the email looks like it was sent after you two had  
20 talked that morning, right?

21 A. Yes.

22 Q. All right. Now, in that email, Mr. Terepka says to  
23 you -- it's -- I think it's the second sentence --  
24 (reading) -- "In the meantime, would you be willing to  
25 provide a W-9 and void the check my clients sent, in which

1 case my client could send you a new check without the backup  
2 withholding." Do you see that?

3 A. Yes.

4 Q. And your response is the next email in the string.  
5 And you say (reading), "No W-9," correct?

6 A. (Reading) "As we agreed."

7 Q. Right, but you also go on to say in that email, "I'm  
8 not doing extra steps." Do you see that?

9 A. Yes.

10 Q. You were not willing to do any extra steps to  
11 consummate this settlement at that point, were you?

12 A. What steps are you referring to?

13 Q. Anything. These are your words. What did you mean by  
14 "I'm not doing extra steps"?

15 A. Mr. -- what I meant was that Mr. Terepka had told me  
16 that it looked like they still needed a W-9, but they wanted  
17 to -- they wanted me to void the check so that they could  
18 send a new check. I thought that was -- so, first of all,  
19 it doesn't sound like anything I could have done would have  
20 resolved this because they still needed a W-9. But, second  
21 of all, they -- the mail arrives and I have a -- because  
22 there was issues with mail theft, I have a mail office. And  
23 so I would have to go to the mail office to get the check  
24 and void it just to satisfy his request, which wouldn't even  
25 resolve this issue because they still needed a W-9 in

1     contravention to what we had agreed.

2     Q.   Well, you didn't want to do any of that?  You didn't  
3     want to void the check.  You didn't want to send it back to  
4     defendants.  You didn't want to provide a W-9.  You didn't  
5     want to do any of those things.  Even though Mr. Terepka was  
6     offering you, "If you do them, we'll send you a check for  
7     the full amount," you still didn't want to do any of those  
8     things, right?

9     A.   It sounded very devious to me.  It sounded like I was  
10    being forced into doing something I explicitly agreed I  
11    would not need to do.

12    Q.   Let's talk about, briefly, some of the extra steps you  
13    decided you would take after this email exchange.  I want to  
14    ask you about -- you made a request for entry of a clerk's  
15    default in this case, correct?

16    A.   Yes.

17    Q.   You did.  And you did that late in the afternoon of  
18    May 26<sup>th</sup> of this year; do you recall that?

19    A.   I don't know the exact date, but that sounds about  
20    right.

21    Q.   Do you recall that it was the Friday before Memorial  
22    Day weekend?

23    A.   Yes.  And it wasn't my intention to file it the Friday  
24    before Memorial Day weekend, but it seems like that's what  
25    happened.



1 Q. Isn't it pretty much standard operating procedure for  
2 you, Mr. Escano, is to fire off motions or letters at 5:00  
3 or after on Fridays?

4 A. I don't know that's true.

5 Q. No? Well, talking about this motion -- I'm sorry,  
6 request for entry of a clerk's default, you filed a reply  
7 brief in further support of that request, right?

8 A. In rely to Mr. Terepka's response?

9 Q. Yeah.

10 A. Yes.

11 Q. Right. Do you remember -- do you recall when you did  
12 that?

13 A. It was probably -- it was very quick. It was probably  
14 the day after he filed his response.

15 Q. Yeah. It was Sunday of Memorial Day weekend; do you  
16 recall that?

17 A. It sounds about right, yes.

18 Q. Were you trying to set out to ruin the Memorial Day  
19 weekend of your opposing counsel?

20 A. No, that was not my intent.

21 Q. That wasn't your intent?

22 A. He's ruined my summer, but -- well, maybe not him,  
23 personally, but this whole kerfuffle. Which I don't  
24 necessarily blame on anyone, but it sounds like somebody  
25 just made a mistake and what's happened has happened.

1 Q. Well, we're talking about the Friday before Memorial  
2 Day and the Sunday before Memorial Day. Do you recall doing  
3 something else in this case on Memorial Day, itself?

4 A. I don't remember.

5 Q. Didn't you email Mr. Terepka at 7:00 his time on  
6 Memorial Day asking him to set up a Rule 26(f) conference?

7 A. Oh, yeah. I don't know if that was specifically on  
8 Memorial Day, but yes, I did send an email to that effect.

9 Q. You don't have any reason to doubt that it was at  
10 7:00 Eastern time on Memorial Day, do you?

11 A. I don't have that email in front of me.

12 Q. I'm going to show you Defense Exhibit 7. And you're  
13 familiar with Defense Exhibit 7, aren't you, Mr. Escano?

14 A. Yes.

15 Q. And if we start from the bottom, do you see your email  
16 to Mr. Terepka on Monday, May 29<sup>th</sup>, and the time stamp is  
17 7:13 P.M.?

18 A. I see that.

19 Q. Okay. That's Memorial Day, isn't it?

20 A. I don't have a calendar in front of me, but if it --  
21 that sounds about right.

22 Q. And you ask (reading), "What days do you have  
23 available for a Rule 26(f) conference?" Do you see that?

24 A. Yeah.

25 Q. And just to be clear, there was no emergency on

1 Memorial Day requiring you to reach out at that time to  
2 schedule a Rule 26(f) conference, was there?

3 A. I have a duty to prosecute this case.

4 Q. This could have waited until the next day, couldn't  
5 it?

6 A. I wanted to send it then.

7 Q. Right. And you did. You wanted him to get this as he  
8 was maybe sitting down to dinner on a holiday, didn't you?

9 A. I don't know how long it would take him to respond.  
10 And I don't think he actually responded for a couple  
11 of days, at least. So I don't think it was like a, you  
12 know, he has to act within four hours type of thing. I  
13 wanted to send the email so I could move on to other things.

14 Q. Real quickly, just to kind of close the loop on any  
15 issues we talked about earlier, your letter threatening to  
16 sue Mr. Terepka and our local counsel, do you recall when  
17 you sent that?

18 A. I don't recall.

19 Q. It was on a Friday at 7:00 Eastern Time, wasn't it?

20 A. Maybe. I don't recall that, though.

21 Q. I'm going to show you what's been marked as  
22 Exhibit 12.

23 MR. MEADOWS: We did make a substitution of this  
24 exhibit, Your Honor. I think it was yesterday, and so I  
25 hope that your version starts with an email?

1 THE COURT: It does.

2 MR. MEADOWS: It does. Good. Thank you.

3 (Discussion off the record.)

4 Q. (BY MR. MEADOWS): And you're familiar with  
5 Exhibit 12, aren't you, Mr. Escano?

6 A. Yes.

7 Q. And is that the email through which you transmitted  
8 your letter threatening to sue Mr. Terepka and Mr. Barcala?

9 A. Yes.

10 Q. What's the date and time stamp?

11 A. Of the email?

12 Q. Of the email transmitting the letter, yeah.

13 A. June -- on this one, it says June 23<sup>rd</sup> 20 -- oh,  
14 wait, yeah, June 23<sup>rd</sup>, 2023, at 6:59 Eastern Daylight  
15 Time.

16 Q. Yeah. And that was a Friday, correct?

17 A. Yes.

18 Q. Yeah. You did that intentionally, didn't you?

19 A. Did what intentionally?

20 Q. You timed the sending of that email and that letter  
21 threatening to sue, so that the recipients would get it at  
22 7:00 Eastern Time, didn't you?

23 A. No.

24 Q. It just happened to be that way?

25 A. It happened to be -- what do you mean "happened to be

1     that way"?

2     Q.    You didn't intend to send it on a Friday at 7:00; it  
3     just ended up that way by accident?

4     A.    I wasn't hanging onto this letter all week long  
5     waiting for Friday to send it.  I probably had finished  
6     drafting it right when I sent -- not right when I sent it,  
7     but I didn't anticipate it would be any kind of issue to  
8     anyone's weekend.

9     Q.    You didn't anticipate that a letter threatening to sue  
10    Mr. Terepka in New Mexico State Court might impact his  
11    weekend a little bit?

12    A.    I don't think so.

13    Q.    You knew exactly how that would impact him, didn't  
14    you?

15    A.    How about the impact to me in the settlement payment  
16    not coming to me?

17    Q.    So you were getting back at him, weren't you?  You  
18    felt aggrieved, and you were going to get him back by  
19    emailing, on Friday night, threats to sue, and emailing him  
20    on Memorial Day weekend and Memorial Day, itself, weren't  
21    you?

22    A.    I wouldn't say I was getting back at him.

23           MR. MEADOWS:  Your Honor, if I might just have a  
24    moment, I think I'm about done.

25                       (Discussion off the record.)

1 MR. MEADOWS: No further questions. Thank you.

2 THE COURT: So, Mr. Escano, now is the time for  
3 you to testify in response to what has been asked of you.  
4 So, for example, if you were asked questions, but those  
5 questions did not permit you to fully explain, now is your  
6 time to do that. I also want you to remember that you  
7 identified yourself as a potential witness in your case, so  
8 the subject matter of this testimony is not limited to the  
9 areas that were covered by Mr. Meadows. You may testify  
10 about anything that's relevant. Do you understand my  
11 instructions to you?

12 MR. ESCANO: I understand, Your Honor.

13 THE COURT: All right. So I will hear from you  
14 now. And please remember that all of this, as you sit in  
15 that chair, is under oath.

16 MR. ESCANO: Essentially, I was under the  
17 impression and I believed and I still, to this day, believe  
18 that the opposing side intended for me to get the full  
19 payment, as listed in the contract. And as far as the whole  
20 W-9 issue, I, of course, did not want the defendants to have  
21 my Social Security number, but I also -- well...essentially,  
22 the crux of it is I believed the full payment would be  
23 coming to me, as we agreed and that we had resolved all of  
24 the tax issues. There was no reason for me to believe that  
25 anything other than that would happen.

1           And then, as for the malicious abuse of process  
2       claims, I did research these issues before sending a letter  
3       to make sure it's a valid claim. I still think it's a valid  
4       claim. I have a duty to prosecute this case.

5           And I think that's it.

6           THE COURT: Okay. So I have questions for  
7       Mr. Escano. And, consistent with our pattern, if these  
8       questions prompt any further questions from you,  
9       Mr. Meadows, or any further narrative testimony from you,  
10      Mr. Escano, you'll be permitted to give that.

11           So I want to ask you about your prior cases.  
12      Whether in Vermont, whether it was three or five, or some  
13      number that's close to that, were those cases filed under  
14      the TCPA like this one?

15           MR. ESCANO: Yes. In most of the cases I've -- I  
16      would file are TCPA cases or related to the TCPA.

17           THE COURT: Okay.

18           MR. ESCANO: Like the motion to enforce in Utah.

19           THE COURT: So you estimated that you may have  
20      entered into a dozen settlements, as a result of which you  
21      received some monetary payment from defendants along the  
22      way. Before this case, did any of the parties with whom  
23      you've settled require you to provide a W-9?

24           MR. ESCANO: Yes, there was one case.

25           THE COURT: Did you provide it?

1           MR. ESCANO: We had a discussion. And, in that  
2 case, they -- they offered -- they mentioned the idea of  
3 having the contract notarized and witnessed, and I was able  
4 to do that.

5           THE COURT: So you did not end up providing a  
6 W-9?

7           MR. ESCANO: Correct.

8           THE COURT: Okay. Before this case, did any  
9 defendant with whom you settled a TCPA claim send a backup  
10 withholding to the IRS?

11          MR. ESCANO: Never. This has never happened  
12 before.

13          THE COURT: Did any of those defendants with whom  
14 you settled, before you entered into the settlement agreement  
15 in that case, issue you a 1099 at any point?

16          MR. ESCANO: I don't -- I don't think so, no.

17          THE COURT: When is the first -- when is the  
18 first year, to the extent you remember, that you entered  
19 into a settlement of a TCPA case, whether it was Vermont or  
20 New Mexico?

21          MR. ESCANO: It would be 2017 or 2018. Either  
22 late 2017, early 2018.

23          THE COURT: And then, if it's been roughly a  
24 dozen, you've settled the cases over the course of different  
25 years between then and now?



1 MR. ESCANO: Yes.

2 THE COURT: Tell me what your view is about  
3 whether settlements of TCPA cases are -- constitute gross  
4 income under tax law.

5 THE WITNESS: Obviously, I would pay all of my  
6 taxes and I do pay all of my taxes. There's an argument to  
7 be made whether or not I'm technically a requestor -- or,  
8 sorry, the opposing side is technically a requestor or I'm a  
9 payee. I think there's a legitimate argument under the  
10 circumstances.

11 THE COURT: Have you treated prior settlements  
12 before this case as gross income?

13 MR. ESCANO: I pay taxes on them, yes.

14 THE COURT: Have you reported every one of your  
15 prior settlements to the IRS as gross income?

16 MR. ESCANO: Yes.

17 THE COURT: If the defendants in this case had  
18 sent you the full amount rather than the amount minus the  
19 backup withholding, was it your intent to report the entire  
20 amount to the IRS as gross income?

21 MR. ESCANO: Yes. And I should -- if I may also  
22 add, I had originally asked for a wire payment. And you  
23 can't really hide wire payments from the IRS, I don't think.  
24 Or maybe you can. I don't know.

25 THE COURT: What information did you provide to

1 Mr. Terepka when you were preferring wire payment instead of  
2 payment by check? What information did you give him?

3 MR. ESCANO: I went to my bank's website and they  
4 have a form a document, like a PDF file, that I can print  
5 out or save. So I think I had to make an edit, because I  
6 called the bank just to double-check, and they said you just  
7 have to write a note. I don't remember what the note was,  
8 but there was a special instruction that I had to write on  
9 top of there, according to what the bank told me, to give to  
10 them.

11 THE COURT: Do you recall if you provided your  
12 own account number?

13 THE WITNESS: Yes, yes.

14 THE COURT: Do you consider your bank account  
15 number to be generally private and confidential information?

16 MR. ESCANO: Not as confidential -- I wouldn't  
17 share it with just anyone, but I don't think it's as private  
18 as a Social Security number.

19 THE COURT: Okay. So you've acknowledged the  
20 taxability -- I don't know if that's a word, but I think we  
21 all understand what I'm trying to say -- the taxability of  
22 settlement proceeds, at least of TCPA cases. And so the  
23 legal issue here is I have to find -- in order to recommend  
24 that you prevail in this legal dispute, Mr. Escano, I have  
25 to find that a material term of the settlement agreement was

1     breached in a material way. So if you've acknowledged that  
2     you owed taxes on the amount, how is what you accuse the  
3     defendants of doing -- how is that a material breach?

4             MR. ESCANO: For one, they're forcing me to pay  
5     those taxes a year ahead of time. There's no basis for  
6     that. And whether -- and also, whether it's a 24 percent  
7     rate or not -- I mean, there are deductions that can be  
8     taken. I have a tax preparer do my taxes and she -- you  
9     know, she asks me a bunch of questions; for example, if I  
10    take a semester of classes, I think that's deductible in  
11    some way. I'm not privy to that --

12            THE COURT: So let me stop you. If it turns out  
13    that the backup withholding is more than you owe, then you  
14    would get a refund. Is that your understanding?

15            MR. ESCANO: I don't know that for sure. That's  
16    what I think the defendants are arguing. I don't --

17            THE COURT: Have you ever gotten a tax refund?

18            THE WITNESS: Yes, yes. Yeah, I assume it would  
19    be correct, if I'm paying more, I could get that --

20            THE COURT: By the way, I hear you. I feel your  
21    pain on paying taxes early, because they take -- they take a  
22    chunk out of my check every single month on taxes that I  
23    don't owe until next April --

24            MR. ESCANO: Yeah.

25            THE COURT: -- so I feel you. And I've asked

1 myself as I prepared for this hearing, "Is that just a cost  
2 of citizenship in this country?" And you know, your opinion  
3 about it is as important as mine.

4 Okay. So you paid -- what they did forced you to  
5 pay your taxes early; why is that material?

6 MR. ESCANO: There could have been other  
7 investments, I mean, that I could have made. I mean, it  
8 would have been extra cushioning for an emergency fund.  
9 There's -- you know, it's a significant -- I mean, it's a  
10 significant amount of money.

11 THE COURT: You had, at one time, the ability to  
12 access 76 percent of the amount that we read in Paragraph 2  
13 of the settlement agreement. Although we would all like to  
14 have the difference between 76 percent and 100 percent, it's  
15 not all that much money. Why is it material?

16 THE WITNESS: Because it's related to the amount  
17 of money I would be getting as part of the settlement. I  
18 mean, it's the only reason I really settled the case, is,  
19 you know, the amount of money. You know, if the defendants  
20 sent me a dollar less than what's in Section 2, I think I  
21 would have a good claim that it's a material breach.

22 THE COURT: What provision of the settlement  
23 agreement -- and do you have it there? Either your  
24 Exhibit 1 or their Exhibit 1; it doesn't make any  
25 difference. What provision of the settlement agreement do

1     you contend prohibits the defendants from complying with  
2     Federal tax law?

3             THE WITNESS: Well, that's -- I have to make a  
4     brief legal argument, but I don't -- I don't think I'm  
5     arguing that they should not -- I'm not arguing that they  
6     should fail to comply with tax law. Technically, if you  
7     want to get into it, I mean, the contract, as written in  
8     black letter, under their own argument, they're saying that  
9     they have to take backup withholding. They're saying that  
10    they can't do what's listed for them in the contract. Word  
11    for word. So they've modified it the way they have. And if  
12    that's true, the contract is invalidated the moment it was  
13    created because a party to a contract cannot do something  
14    that's illegal. I'm not asking for enforcement of the  
15    contract. I'm saying that it's void. It's invalidated. So  
16    maybe -- well, yes, you know.

17            THE COURT: So if I understand your testimony  
18    correctly, you have learned something since you entered  
19    the -- since you executed the settlement agreement on  
20    May 4<sup>th</sup>. You have learned, according to you, about this  
21    backup withholding, about the defendants' obligation to send  
22    it directly to the IRS, if you don't give them a W-9, in the  
23    amount of 24 percent. Are these facts you've learned after  
24    you entered into the settlement agreement?

25            THE WITNESS: Yes.

1           THE COURT: So let me ask you to turn, then, to  
2 Paragraph 6 of the settlement agreement. It's on page 2.  
3 Please read that provision and tell me what you understand  
4 it to mean.

5           MR. ESCANO: Section 6, Paragraph 6 says --

6           THE COURT: No, you don't have to read it to us;  
7 just read it to yourself.

8           THE WITNESS: Okay. So I read this to mean that  
9 it's talking about facts -- most directly to facts regarding  
10 the case, but just facts, certainly not legal -- legal  
11 requirements or legal opinions or legal case law. This  
12 is -- this section is purely about facts regarding the case  
13 and not legal -- legal requirements.

14          THE COURT: By the way, did you read every single  
15 word of this settlement agreement before you signed it?

16          MR. ESCANO: I think so, yes.

17          THE COURT: Did you read it more than once?

18          MR. ESCANO: I don't -- I can't say for certain,  
19 but -- I mean, we did discuss it, but I can't say for  
20 certain I did a whole read-through each time.

21          THE COURT: Okay. This is your phrase and I just  
22 want to ask you, even the fine print?

23          MR. ESCANO: Of the contract?

24          THE COURT: Uh-huh.

25          MR. ESCANO: Any word that's in here, I've

1 read --

2 THE COURT: Okay.

3 MR. ESCANO: -- but I don't know how many times  
4 I've read it.

5 THE COURT: You know, when you were talking about  
6 the fine print in the IRS forms, I looked at it and I didn't  
7 think that the -- that the sections of the form to which  
8 Mr. Meadows brought your attention was in any different font  
9 than the other -- and I'm certain that it's not. So it's  
10 not -- it's not, you know, miniaturized. Why do you  
11 consider it fine print if it's in the same font as the rest  
12 of the form?

13 MR. ESCANO: Just in the sense that it's -- I  
14 mean, it's not anywhere near, like, 12-point font or  
15 anything like that.

16 THE COURT: That's a criticism of the entire form  
17 then, right?

18 THE WITNESS: Yes, yeah.

19 THE COURT: I asked, while you were testifying,  
20 because I'm interested in -- in what you have to say. I  
21 asked my law clerk to print out for me the TCPA, itself.  
22 And I'm holding it. This has a bunch of fine print. And  
23 you may be -- the people in this room may be, in my own  
24 experience, the people most informed about the TCPA I've  
25 ever met. There's a ton of fine print in here. And now,

1 I've just picked up the New Mexico version of the Federal  
2 TCPA. And, Mr. Escano, I have to tell you, this is loaded  
3 with fine print, too. And if somebody asked me if I think  
4 you have read this and maybe even memorized it, I'd have to  
5 say yes. But what would your answer be?

6 THE WITNESS: I probably haven't read the whole  
7 thing; just maybe certain pieces of it that I've filed  
8 claims under.

9 THE COURT: It's worth it, though, to read the  
10 entire thing because maybe somebody has done something to  
11 you that violates another provision of it which might cause  
12 those damages to multiply, yes?

13 MR. ESCANO: Yes.

14 THE COURT: Okay. Mr. Meadows asked you about  
15 what you meant by refusing to take extra steps. Would you  
16 look at paragraph 25 of the settlement agreement. Read it  
17 to yourself again. And, when you're done, tell me what you  
18 think what obligation it imposed on you.

19 MR. ESCANO: So this seems like it's a two-part  
20 paragraph. I read it to mean any reasonable sort of closing  
21 acts in the settlement need to be performed by the parties  
22 to close it out. And -- and the second part says to -- it  
23 seems to imply that closing documents are required. And, of  
24 course, all of this, I read it to mean, is contingent upon  
25 the other side fulfilling their obligations under the



1 agreement. And I should also add, if we had not discussed a  
2 W-9, I believe a W-9 would be a requirement under this  
3 section. Providing a W-9 would be a requirement. This  
4 would not be an issue if we had not agreed that I did not  
5 need to provide a W-9. If it came to everything, you know,  
6 being said and done, and they asked me for a W-9 and we had  
7 not discussed it, I certainly would have provided it.

8 THE COURT: You have testified today that, on  
9 April the 12<sup>th</sup>, in a phone call, Mr. Terepka alerted you  
10 to the W-9 and the related instructions. Do you recall  
11 today whether you took the time to look at them either that  
12 day or at any time between April the 12<sup>th</sup> and the day on  
13 which you signed the settlement agreement?

14 MR. ESCANO: I definitely did not read the  
15 whole -- I definitely did not read the whole W-9 form. And  
16 the reason for that is, again, this is opposing counsel.  
17 And, you know, we had had discussions -- you know,  
18 respectfully to opposing counsel, we had had discussions,  
19 before we had gotten to the settlement amount, about the  
20 TCPA. And a lot of the arguments presented were kind of not  
21 really great arguments, to be frank, and so, then I was able  
22 to surmount them and get to the settlement amount. But  
23 there was no -- I didn't feel there was any reason for me to  
24 read it if the whole point was this was part of a  
25 negotiation. You know, if he had said, "there's no way my

1 client will pay the W-9" -- sorry -- "can pay the settlement  
2 amount without a W-9. There's absolutely no way," if he had  
3 said that, then, yeah, I would have -- well, actually, I  
4 don't know if I would have really read it. In that case, I  
5 would have just provided a W-9. Again, it was negotiations.  
6 So this is opposing counsel sending me something to support  
7 their argument that the ultimate determination, ultimate  
8 decider, on whether or not I would be providing a W-9 is not  
9 the form, it's what they are requiring of me. And when they  
10 agreed to --

11 THE COURT: Is it your testimony today that there  
12 are circumstances in this case under which you would have  
13 provided a W-9 to Alexander Terepka?

14 MR. ESCANO: I've offered one since this whole  
15 issue became a kerfuffle to resolve it, but the opposing  
16 side said, "No deal. You know, we have to collect our  
17 fees."

18 THE COURT: You've offered your own version of  
19 the W-9, one that does not include your Social Security  
20 number?

21 MR. ESCANO: Yes, yes.

22 THE COURT: In retrospect, do you wish you had  
23 given them a W-9?

24 MR. ESCANO: You know, I wish they would have  
25 been honest. I wish they would have been up front with me.

1 THE COURT: How about the answer to my question?

2 MR. ESCANO: Sorry. Yeah, probably.

3 THE COURT: Did you realize on May the 15<sup>th</sup>,  
4 when you declared a material breach and the deal was off,  
5 that you were bringing into life Paragraph 18 and the  
6 obligation for the loser of an enforcement effort to pay the  
7 winner?

8 MR. ESCANO: I didn't -- it probably wasn't in  
9 the front of my mind, you know, during this period, but I  
10 agreed to the agreement, so it's there --

11 THE COURT: Okay.

12 MR. ESCANO: -- I agree to that.

13 THE COURT: Why did you file the motion for entry  
14 of default?

15 MR. ESCANO: Because the case had been on the  
16 docket for probably about three months. Mr. -- the opposing  
17 side was not really doing anything. I have a duty to  
18 prosecute this case. I have -- in one of my first cases, I  
19 had an issue with that, so that's why it's -- you know, I  
20 had an issue where a case was not being prosecuted and that  
21 became an issue. So I just wanted to make sure I was  
22 prosecuting the case, but also to -- just to move things  
23 along.

24 THE COURT: So one of the defense exhibits -- and  
25 it's Exhibit Number 30 -- is simply a copy of Federal Rule

1 of Civil Procedure 55. Did you familiarize yourself with  
2 that rule before you filed the request for entry of default?

3 MR. ESCANO: Yes, I did. And although the  
4 defendants were in the case, I felt like there was good  
5 legal basis to still file the request for entry of default,  
6 not for default judgment. And, indeed, very shortly after  
7 that, the defendants did file an Answer. It was effective  
8 in moving the case along, and they had not requested any  
9 extension of time to respond to the Complaint.

10 THE COURT: So the very first provision of  
11 Rule 55 begins (reading), "When a party against whom a  
12 judgment for affirmative relief is sought has failed to  
13 plead or otherwise defend..." so one option is you can file  
14 your pleading, which is the Answer. The other option is "or  
15 otherwise defend." How did you construe the phrase "or  
16 otherwise defend"?

17 MR. ESCANO: That would be another dispositive  
18 motion of some kind. They had not filed a motion to compel,  
19 if I recall correctly -- if I recall correctly, they had not  
20 filed any kind of dispositive motion; they had filed notices  
21 of some kind at that point, but nothing defending themselves  
22 from the Complaint.

23 THE COURT: Okay. That used to be the rule. The  
24 rule has since changed, but you would have had to get to the  
25 fine print to understand the change.

1           So we heard all about Memorial Day weekend. My  
2 question for you is, you withdrew the notice of default --

3           MR. ESCANO: I did.

4           THE COURT: -- but it took you five weeks. Why?

5           MR. ESCANO: They had answered the Complaint. I  
6 don't know the exact time frame. It sounds -- five weeks  
7 sounds about right. I think I probably read something --

8           THE COURT: They answered on May 29<sup>th</sup>, and you  
9 withdrew on July 3<sup>rd</sup>. That's five weeks.

10          MR. ESCANO: Yes.

11          THE COURT: I checked.

12          MR. ESCANO: Yes. So around the time before I  
13 withdrew the request, I probably -- I think I read something  
14 about requesting default. Since they had an Answer, things  
15 had changed, of course. And I probably had read -- I think  
16 I read something about -- basically, I came to the  
17 determination that it would be very unlikely that an entry  
18 of default would be granted, and so I just withdrew.

19          THE COURT: Okay. I'm going to ask you about the  
20 letter that you wrote. It's Exhibit 12. Do you still have  
21 it?

22          MR. ESCANO: Is this the malicious abuse of  
23 process letter?

24          THE COURT: It is.

25          MR. ESCANO: It's somewhere here. Let me find

1 it.

2 I have it.

3 THE COURT: Tell me why you threatened to sue the  
4 lawyers personally.

5 MR. ESCANO: I had researched it and felt like I  
6 needed to find some recourse here. I felt like I was really  
7 being abused. There was no basis for the opposing side to  
8 act the way they have. And, obviously, the attorneys are,  
9 you know, the hand of the opposing side. And I tried to  
10 figure out what recourse there was. And I researched the  
11 issue of malicious abuse of process, and it seemed like it  
12 was -- I still believe it's accurate here. Maybe it's not.  
13 Maybe it is. I don't know. But, to me, it seems as it is.

14 THE COURT: Why did you add their law firms,  
15 which include people you've never met and with whom you have  
16 not interacted?

17 MR. ESCANO: You know, the research I found shows  
18 that -- had cases where law firms were sued as well for  
19 similar -- for similar acts.

20 THE COURT: And then we -- I took testimony and  
21 I've seen the exhibit about your email thereafter  
22 essentially instructing them to consider that letter to be  
23 confidential and a consequence if they failed to do so. Why  
24 did you want it to be confidential?

25 MR. ESCANO: There was just personal information

1 in there, in the second-to-last paragraph. I didn't want  
2 that public. It's not a huge deal to me, but...

3 THE COURT: And did you make that clear in your  
4 email --

5 MR. ESCANO: No --

6 THE COURT: -- that it was -- that particular  
7 provision of the letter that was prompting the  
8 confidentiality concern?

9 THE WITNESS: -- no, no, I didn't.

10 THE COURT: Then why use such a hammer as a  
11 consequence, that, if they failed to do so, you will  
12 construe their failure to admit everything you're about to  
13 allege against them in an abuse of process complaint? Why  
14 such a disproportionate consequence?

15 MR. ESCANO: Like, I couldn't tell you. I mean,  
16 this email was sent late at night and, you know, almost  
17 midnight and -- well, I'm not sure. This may be Eastern  
18 Time, but in the evening.

19 THE COURT: Do you regret today sending that  
20 letter?

21 MR. ESCANO: Perhaps because of the implication.  
22 It sounds like -- it makes it seem like the letter I sent  
23 threatening for malicious abuse of process was improper. I  
24 don't think it's improper, but...

25 THE COURT: They filed their motion on June the

1 1<sup>st</sup>, and you waited 22 days, more than three weeks, to send  
2 the letter. So, definitely, your -- cooler heads have time  
3 to prevail in three weeks. Any comment about that?

4 MR. ESCANO: I think the whole thing was not very  
5 cool at all.

6 THE COURT: You've litigated -- I'm just going to  
7 guess -- between 12 and 16 cases on behalf of yourself  
8 seeking to vindicate your rights in multiple jurisdictions.  
9 Is this the first time you ever threatened to sue opposing  
10 counsel personally?

11 MR. ESCANO: Yes. This has never -- this is  
12 the -- yes.

13 THE COURT: How about is this the first time  
14 you've ever threatened to sue the law firm with which he or  
15 she is affiliated? Is this also the first time?

16 MR. ESCANO: Yes.

17 THE COURT: And there hasn't been a whole lot of  
18 time since then. Have you done so since in any other case?

19 MR. ESCANO: No.

20 THE COURT: The phone call following the letter  
21 Mr. Terepka sent you about the backup withholding, the  
22 immediate call that might have interrupted your breakfast,  
23 you say you weren't angry. He says you were. I want you to  
24 tell me exactly what you remember telling him.

25 MR. ESCANO: So -- okay. So I called him



1 immediately. I was very calm initially and -- which is why  
2 I raised my voice. And I admit I raised my voice. But I  
3 was very calm, and I just -- I wanted to -- he sent me this  
4 letter dated May 12<sup>th</sup>, the day the check was to arrive.  
5 So I decided to call him. Maybe there's something he can  
6 say over the phone that he can't say in writing; maybe  
7 something is going on, maybe there's some kind of resolution  
8 here. I was very calm. And I just asked him basic  
9 questions about the letter, asked him, "Okay, how much money  
10 is your client going to pay?" It was not the amount of  
11 money that was in the settlement contract. But, beyond  
12 that, Mr. Terepka pretended as if this was just a foregone  
13 conclusion. He just cited the IRS forms and said, "Yeah, as  
14 you know, just like as if you're an employee." It was  
15 baffling to me. And he kept going. And I kept asking calm  
16 questions and he kept going. And I realized there was no  
17 change. I mean, what's in the letter is in the letter,  
18 apparently. And I wasn't -- I was shocked, but I was not  
19 angry. I don't really get angry.

20 But, the day before, I had had a contentious  
21 phone call with another opposing counsel. I was calm in  
22 that. It was another matter, but the opposing counsel  
23 raised his voice and actually used profanity against me.  
24 And, basically, I figured that I need to get my point  
25 across, that I would not accept this change in our

1     agreement. And so, you know, I raised my voice and I asked  
2     him, you know, "What do you think -- what kind of recourse  
3     do you think I'm going to take, if I go after, you know,  
4     telemarketing calls, if someone reduces a payment by the  
5     amount that they have?"

6             THE COURT: I want you to reenact the exact words  
7     you used, as best you remember them. You don't need to  
8     doctor it up for Court.

9             MR. ESCANO: The words are -- have been presented  
10    are fairly accurate. I asked, "What do you think someone  
11    who sues for telemarketing calls will do when you steal from  
12    them?" I didn't call Mr. Terepka a "thief," but that was  
13    the words I used. And, again, it was purely to get my point  
14    across. It was not a -- it was not a -- it was not a burst  
15    of anger. It was to get my point across.

16            THE COURT: And I heard today from Mr. Terepka  
17    that you repeated this as many as six times. Do you recall  
18    doing that?

19            MR. ESCANO: Yes. And, again, it was just to get  
20    my point across. I felt it was an egregious act. And not  
21    just the act, itself, but pretending as if it was a foregone  
22    conclusion.

23            THE COURT: Give me just a moment, please.

24            MR. ESCANO: Sure.

25            THE COURT: In the email that you sent yesterday

1 where you copied defense counsel and you sent to me that  
2 accompanied what is now Plaintiff's Exhibit 5 --

3 MR. ESCANO: And, Your Honor, if I could  
4 interrupt, I just want to clarify. What I said was, "When  
5 someone steals from them." I'm not sure if I said, "If you  
6 steal from me," I said, "When someone steals from them, what  
7 do you think someone will do when someone steals from them?"  
8 Not implying that Mr. Terepka was the one who stole from me,  
9 but okay.

10 THE COURT: Thank you for the clarification.

11 You pointed out in the email that the defendants  
12 sent backup withholding in June, which is more than 14 days  
13 after the execution of the settlement agreement. We've  
14 heard testimony about why today, but let me ask you this:  
15 What prejudice did it cause you, this delay, whether it's 10  
16 or 20 days of the IRS getting the backup withholding? What  
17 prejudice does it cause Ruben Escano?

18 MR. ESCANO: I don't think it causes a prejudice.  
19 The reason I brought it up is because there is an  
20 inconsistency with the terminology of the payment and  
21 settlement amount, check, they're using it in terms of  
22 referring to the full amount in some cases, but then have  
23 referred to it to meaning, well, the settlement amount, you  
24 know, minus 24 percent for backup withholding. I'm not sure  
25 if that answers your question.

1           THE COURT: Do you intend -- as you sit here  
2 today, irrespective of the outcome of the legal issue that  
3 is pending before me and Judge Garcia, do you intend to file  
4 a malicious abuse of process action against anyone in this  
5 case?

6           MR. ESCANO: I don't currently intend to. I'm  
7 not -- well, I don't intend to, but I'm -- it's -- I feel  
8 that it's within my right to do so. I feel like the legal  
9 claim is valid, but there is a -- I don't intend to do that  
10 right now.

11          THE COURT: Are you awaiting the outcome of this  
12 motion hearing before deciding whether you have a claim?

13          MR. ESCANO: I was not waiting. I could see why  
14 that would be important, but I had kind of forgotten about  
15 the malicious abuse of process claim -- not forgotten. I  
16 mean, I knew I sent it, but it's not a front-of-mind kind of  
17 thing.

18          THE COURT: You can tell it struck a nerve.

19          MR. ESCANO: Yeah.

20          THE COURT: Mr. Meadows, did my questions prompt  
21 any follow-up from you?

22          MR. MEADOWS: No, Your Honor. Thank you.

23          THE COURT: Mr. Escano, you elaborated where it  
24 was necessary for you to do so, but I don't want to deny you  
25 the ability to testify about -- in furtherance of any other

1 answer to any question I asked you. Do you wish to do so?

2 MR. ESCANO: No. I think we covered everything.

3 THE COURT: You can take your seat.

4 Mr. Meadows, do you rest?

5 MR. MEADOWS: Yes, Your Honor.

6 THE COURT: Mr. Escano, do you rest your case as  
7 well?

8 MR. ESCANO: I do with just the exception of  
9 closing statements.

10 THE COURT: Oh, yeah, I was just talking about  
11 the evidence.

12 MR. ESCANO: Okay.

13 THE COURT: Here's what we're going to do: We're  
14 going to take another -- it's, like, :43 on that clock,  
15 2:43. So, at 2:55, we will come back to the court and get  
16 back on the record for the purpose of hearing summations.  
17 And, gentlemen, what I'm looking for isn't for you to repeat  
18 what you've written to me. I promise, I've done you the  
19 favor of reading your briefs at least three times each.  
20 What I want you to do is comment about how the evidence that  
21 we heard today affects the legal position that you have.  
22 That's what I want to hear.

23 So I'll see you at 2:55.

24 (A recess was taken.)

25 THE COURT: We're back on the record. It's time

1 for closing summations. And I'll hear from the defendants  
2 first.

3 MR. MEADOWS: Thank you, Your Honor. And thank  
4 you for your time and attention today. I'll try to be brief  
5 and address directly the question that you told us that you  
6 were interested in before we broke.

7 The evidence that you heard today confirms, first  
8 and foremost, that there was no breach of the settlement  
9 agreement. Nothing in this agreement prohibited the  
10 defendants from paying backup withholding to the IRS with  
11 regard to the settlement consideration due to Mr. Escano.  
12 On the contrary, I think everyone agreed, by the end of  
13 today's evidence, (a), that some payment was fully  
14 reportable as income for Mr. Escano; and (b), that because  
15 he refused to supply a W-9 that the backup withholding was  
16 legally required by IRS regulations.

17 So even if the parties had attempted to contract  
18 around those requirements, which they didn't, but even if  
19 they had tried, that would have been ineffective. The  
20 settlement agreement is fully enforceable for those reasons.  
21 But even if there had been some breach -- and I think your  
22 questions really brought this into sharp relief -- it  
23 certainly wasn't material. The maximum harm, so to speak,  
24 that Mr. Escano has suffered here is that, by withholding  
25 having been paid, some portion of his taxes were paid ahead

1 of time rather faster than they would have been due at the  
2 end of the year. That can't be material, (a), because it's  
3 just not a tremendous amount of money, but, (b), it's  
4 exactly the same sort of backup withholding we all live  
5 with. All of us have pay withheld from our paychecks;  
6 therefore, paying our taxes well in advance. If that were a  
7 material breach of a settlement agreement or another agreed  
8 requirement of payment, I think we would have material  
9 breaches all over the place. And, certainly, no one  
10 understands withholding like that. When we think about some  
11 of the arguments that Mr. Escano has made here, "That by  
12 doing withholding, you improperly -- defendants improperly  
13 paid my taxes for me," that's not what withholding is. None  
14 of us understand it that way because it's just not how it  
15 functions.

16 By the same token, Mr. Escano has argued in his  
17 briefing that we made misrepresentations to him and the  
18 contract should be voided for that reason. And the evidence  
19 we heard today undermines that misrepresentation argument.  
20 Mr. Terepka -- the evidence was Mr. Terepka, not only a week  
21 before the contract was signed, told Mr. Escano about Form  
22 W-9, but pointed him to Form W-9, itself, and the  
23 instructions on the form. And, as we saw, the instructions  
24 are replete with warnings that, if you don't provide a W-9,  
25 a backup withholding is the inevitable legal consequence of

1       that decision.

2               Now, whether Mr. Escano took the time to read the  
3       W-9 or not, he certainly was on notice and could have found  
4       out what the consequences were of his refusal to provide a  
5       W-9. Nothing was hidden from him. It was all publicly  
6       available out in the open. And what that leaves him with is  
7       nothing more than a subjective understanding, in his view,  
8       that the agreement somehow precluded a backup withholding or  
9       absolved him of the legal consequences that would follow  
10      from providing a W-9.

11             But whatever his subjective understandings happen  
12      to be, (a), they are legally irrelevant. Whatever he had in  
13      his head is not what where he look at when we follow the  
14      objective theory of contracts and enforcing the words that  
15      are on the page. But even more than that, he agreed, in  
16      multiple places in the agreement, that he wasn't relying on  
17      any subjective understanding or any statements made to him  
18      outside the contract. So, legally, none of those are  
19      meaningful at all. Even if we were to consider them and  
20      even if we did consider them, for the same reasons I told  
21      you about Mr. Terepka's email or phone call telling him  
22      about the W-9 and the instructions, there was no  
23      misrepresentation, in the first place.

24             Because all of that is true, the contract  
25      settlement agreement has to be enforced. And because the



1 settlement agreement has to be enforced, as a legal matter,  
2 all of it has to be enforced. That means Mr. Escano should  
3 be ordered to dismiss his case, putting an end to this  
4 litigation, but we're also entitled to an award of  
5 attorney's fees. And I should make clear, the contract is  
6 the only basis of the fees. We have sought them under the  
7 contract. And it's important to keep in mind here the  
8 contract says we're entitled to enforce the agreement, but  
9 any that relate to a breach. And I would submit that all of  
10 the fees for which we've sought compensation today at least  
11 relate to Mr. Escano's breach, which, after all, is  
12 persisting with litigation that should have been dismissed.

13 THE COURT: So I obviously asked Mr. Terepka this  
14 question. I am just stunned there wasn't a request for  
15 judicial relief to put a stop to it while the motion to  
16 enforce was pending. What's your view?

17 MR. MEADOWS: Your Honor, I heard you make that  
18 point and that's something I've been thinking about since  
19 you brought that up, especially because I'm new to this  
20 case. And so it helped me to think about it independently.  
21 And your suggestion is very well taken, and that motion may  
22 well -- that -- maybe it's something we should have filed.  
23 But I would suggest this to you, as you know, it takes time  
24 to prepare a motion. It takes probably six weeks to fully  
25 brief one once it's been filed. The expense of that motion

1 would have been additional expense we'd be seeking  
2 compensation for today. But more to the point, between the  
3 time we would have filed it and presumably you would have  
4 decided it, but knowing you've got a busy docket, decisions  
5 don't come down the next day. All of the activities you saw  
6 that Mr. Escano engaged in would have continued unabated.  
7 There would have been nothing to stop him from doing all of  
8 the things he did between the filing of a motion to stay and  
9 the granting of a motion to stay.

10 So if we had filed that motion, it may have  
11 prevented some of this, but very little. The vast majority  
12 of the expenses for which we're seeking compensation relate  
13 directly to the motions that we filed either to enforce the  
14 settlement agreement or to oppose Mr. Escano's motion to  
15 void the settlement agreement. And all of the other  
16 activities -- responding to e-mails, motions for default, or  
17 requests for default -- I think most, if not all of that,  
18 would have occurred in any event. I wish I could say we  
19 could have stopped it. I'm not sure we could have.

20 I don't know that Mr. Escano's litigation  
21 activities warrant a whole lot of additional emphasis in  
22 this closing argument. I think they speak for themselves in  
23 the way he conducted himself. And, frankly, if that's not  
24 abusive litigation conduct, I'm not sure what is. He had  
25 every opportunity at multiple points of this case to stand

1 down, to let this motion to enforce play itself out and, if  
2 he won, to, you know, press forward with his case as  
3 aggressively as he wanted to do. That's not the tactic he  
4 took. He was obviously personally aggrieved, whether he  
5 should have been or not, and sought some retribution for  
6 that. And I would submit to you that that kind of conduct  
7 calls out for some sort of judicial sanction. And the least  
8 that can be said of that or that can be done is to enforce a  
9 voluntary agreement he made to compensate our clients for  
10 the attorney's fees they incurred and which they never  
11 should have.

12 So I don't want to belabor any of that. I think  
13 the evidence --

14 THE COURT: So, Mr. Meadows, let me ask you, on  
15 the 31<sup>st</sup> day of March of this year, I filed a decision.  
16 It was the last decision I filed in a case that went on for  
17 more than five years in a contract dispute between a major  
18 corporation here in New Mexico and its former insurer. Are  
19 you familiar with that decision?

20 MR. MEADOWS: I apologize, but I am not, no.

21 THE COURT: I would have been stunned if you  
22 were. But there, I had Dallas-based big law counsel asking  
23 me to pay Dallas-based big law rates under a contractual  
24 fee-shifting provision. And I wasn't having it.

25 MR. MEADOWS: That rings a bell. I'm now -- I do

1 remember that.

2 THE COURT: And so I'm -- I try to be transparent  
3 in this job. I'm going to be figuring it out, because it's  
4 the Court's obligation to, if the Court awards fees at all,  
5 to do so in a reasonable way that includes the rate. So you  
6 won't be surprised, will you?

7 MR. MEADOWS: I won't be surprised, Your Honor.  
8 But if I may, I think it's important to just emphasize a  
9 couple of quick things. And I know you've heard the  
10 evidence on this, but our rates at Watstein Terepka -- and I  
11 haven't -- I don't recall the specifics of that decision  
12 with the big Dallas firm, but I would wager that our rates  
13 are significantly less than theirs, so -- no? Even though  
14 we're an out-of-town firm and a small litigation boutique,  
15 and I acknowledge our rates are expensive and I'm sure  
16 they're higher than the rates that prevail here in  
17 southern -- western New Mexico, Mr. Escano was making the  
18 choice to sue out-of-state defendants in almost all of these  
19 cases. And they're in front of your docket, K&L Gates and  
20 firms of that ilk. You know, it's what the defendants are  
21 deciding is required, I think, with a lot of justification,  
22 to take on Mr. Escano, who, as you acknowledge, may be the  
23 single greatest expert on the TCPA in this state. And it  
24 behooves the defendants to arm themselves with lawyers who  
25 are experts in this field.

1           Now, agreed, at some point, this litigation  
2 transitioned from TCPA into contract litigation. No one, as  
3 a practical matter, kind of changes lawyers in the middle of  
4 that and says, "Let me downsize and get some different  
5 lawyers to litigate the enforcement of the settlement" and,  
6 you know, to a significant degree, deprive our clients of  
7 the benefit of their bargain to write down our fees, to  
8 which Mr. Escano agreed, just because he transitioned this  
9 late allegation from TCPA to contract enforcement.

10           So, with that, I hope I've answered your  
11 questions as best I can. We've got nothing further. And  
12 thank you, Your Honor.

13           THE COURT: Thank you.

14           Mr. Escano?

15           MR. ESCANO: Thank you for your time, Your Honor.

16           THE COURT: Likewise.

17           MR. ESCANO: Your Honor, this case -- this case  
18 ultimately is about a promise. It's about the promises that  
19 we make. And it's about what we do when we realize we made  
20 a mistake. We made a promise that, for whatever reason, we  
21 cannot keep. Usually, people do the right thing. Usually,  
22 when people realize they made a promise they can't keep,  
23 they talk about it. They're up front with the other side.  
24 They're honest. They try to figure out how they can resolve  
25 the issue. But what we don't do, we don't pretend like we

1 never made the promise in the first place. We don't pretend  
2 like up is down and down is up, left is right and right is  
3 left. The defendants here in this case made a promise, a  
4 very simple promise. In black letter. Very clear. But at  
5 the 11<sup>th</sup> hour, when it came time to fulfill on that  
6 promise, they realized they had made a mistake. They  
7 realized that the settlement, for whatever reason, internal  
8 company policy, tax law, whatever it is, they realized that  
9 they had made a mistake and the settlement was not going to  
10 go the way they thought this was going to go. What did they  
11 do? Were they up front? Were they honest? Did they try to  
12 talk about it? No. They just pretended like they never  
13 made the promise in the first place. The very clear  
14 promise. Very simple.

15           The evidence today, you know, there are three  
16 questions, I think, for the Court to decide: What did the  
17 parties agree to? The first one. The second: What did  
18 they mean when they agreed to it? And the third: Did they  
19 fulfill their respective ends, their respective obligations  
20 under the agreement? As much as they talk about tax law or  
21 maybe -- who knows what it is? Something happened at the  
22 11<sup>th</sup> hour. The evidence has shown that Mr. Terepka said  
23 that he did not have a belief as to what I understood the  
24 words "payment" and "settlement amount" and "check" to mean,  
25 other than to say that they would be in compliance with tax

1 law. I get it. Sure. But that's not what we discussed.  
2 That wasn't their promise. And if they wanted to  
3 renegotiate or talk about it or be up front, they should  
4 have done that. But they didn't.

5 The accountant, Ms. McKinney, said that she  
6 became aware of the need to take a backup withholding in  
7 late May and not in April. And when I asked Mr. Terepka if  
8 they could have plussed up the settlement payment to resolve  
9 this entire issue, all of this could have been resolved by  
10 just plussing it up, X plus Y. I would still get the amount  
11 in Section 2; they would pay the IRS extra; supposedly, I  
12 could get that money back. And they call it a "windfall."  
13 I don't know how I would get that money back if I don't  
14 provide a Social to them, but, nonetheless, this could have  
15 been resolved for far less money. Far less than \$163,000.

16 THE COURT: And counting, apparently.

17 MR. ESCANO: Yes. And -- yes, far more than that  
18 now, yes. And, when I read that figure, I felt like a bomb  
19 blew up in my head, not because of my requests for fees, but  
20 because I had no idea how them trying -- the opposing side  
21 trying to pretend like they never made a very clear promise,  
22 in the first place, got to this point.

23 This -- however way you cut it, this is a bad  
24 contract. I am not asking to enforce the contract and  
25 Mr. Terepka has admitted -- well, has stated that none of

1     this -- none of the cases that the opposing side has cited  
2     are with one side arguing for enforcement of the settlement  
3     and the other side arguing for voiding the settlement. All  
4     of the cases that have been presented by the opposing side  
5     are combating motions to enforcement. And when it comes to  
6     combating motions to enforce, of course, tax law wins. We  
7     don't dispute tax law. But what I'm saying is that there  
8     was a promise here. And the contract states specific  
9     actions that the defendants needed to take.

10                 And let's hop over all the tax law. We could  
11     have spent hours -- we can spend days on tax law. And I  
12     don't think the tax law that's relevant here is encompassed  
13     in just one IRS form. But let's imagine that the defendants  
14     are right. Let's imagine that they have to take backup  
15     withholding. Let's imagine that I read the section about  
16     backup withholding. Let's imagine all of that. What  
17     they're saying is that they cannot do what's listed for them  
18     in the contract; otherwise, they would be in violation of  
19     the law. So they've modified it in the way they have.  
20     They're saying that, if they do everything that's listed for  
21     them in the contract as it is listed for them, they would be  
22     in violation of the law.

23                 If that is true, then the contract was  
24     invalidated the instant it was created. It's  
25     well-established contract law that a contract cannot require



1 any party to a contract to do something that is illegal.  
2 And if their entire argument is true, let's imagine that  
3 it's true, they are saying that the contract is requiring  
4 them to do something that is illegal. And because I am not  
5 filing a motion to enforce the contract, I'm saying it's not  
6 a good contract. I'm saying the promise, we have to  
7 renegotiate it. I'm not saying to enforce the contract.  
8 And I have voided the check they sent me. Any way you slice  
9 it, it's a bad contract. It should have been renegotiated  
10 from the beginning. It should have never gotten to this  
11 point.

12 And because of that, the motion to void the  
13 contract -- my motion to void the contract, I'd respectfully  
14 request that it be granted and the defendants' motion to  
15 enforce the settlement be denied.

16 THE COURT: Thank you. All right. Thank you,  
17 both sides, very much. I'm taking these motions under  
18 advisement. I will issue the PFRD as soon as I reasonably  
19 can. There's a lot going on here. I want to -- I took a  
20 bunch of notes, but I want to read the transcript. I want  
21 to reexamine the exhibits in light of the testimony. And I  
22 want to re-read the briefs and the cases that you've cited.

23 So pay attention. In the meantime, this case is  
24 stayed for all purposes. No discovery, no Rule 26(f)  
25 conferences. Frankly, there ought not be a lot of

1 communication between the parties, but I'm not ordering you  
2 not to communicate with each other. The First Amendment  
3 gets in the way of that. But as far as I'm concerned, you  
4 can point to the order staying this case for all purposes as  
5 a reason not to communicate with each other.

6 The next topic is, Mr. Terepka, I want to give  
7 your firm until October the 3<sup>rd</sup> -- that's two weeks from  
8 today -- to submit your final supplemental request for  
9 payment of fees and expenses. Is that enough time?

10 MR. TEREPKA: Yes, Your Honor. We'll make that  
11 work.

12 THE COURT: All right. And I'm considering what  
13 you will send to me and to Mr. Escano to be essentially a  
14 supplement to Exhibits 37 through 39. So for us to keep a  
15 clean record, it makes sense to me that we ought to consider  
16 those to be either 37(a), 38(a), and 39(a) or Exhibits 52  
17 through 54. Do you have a preference?

18 MR. TEREPKA: (a) makes sense to me, Your Honor.

19 THE COURT: All right.

20 Mr. Escano, is that all right with you?

21 MR. ESCANO: That's okay with me.

22 THE COURT: Okay. And then, Mr. Escano, because  
23 you didn't have a chance to see the exhibits with the fee  
24 requests before the briefing was done, I'm going to give you  
25 two weeks, which is until October the 17<sup>th</sup>, to object to

1 the reasonableness of the request -- and the reasonableness  
2 is both with respect to the number of hours and the hourly  
3 rate -- two weeks to do so in writing, filed on the docket.

4 And then the defendants will have two weeks after  
5 that to respond to the objections. And, at that point, the  
6 briefing on the fee request is closed.

7 I'll just emphasize that, if Mr. Escano prevails,  
8 there will be no discussion by the Court of the fee request.

9 All right. Any questions? Anything further,  
10 Mr. Meadows?

11 MR. MEADOWS: No, thank you, Your Honor.

12 THE COURT: Mr. Escano, any questions or anything  
13 further?

14 MR. ESCANO: No questions, Your Honor.

15 THE COURT: I wish all of you safe travels back  
16 home.

17 Court's adjourned.

18 (The proceedings concluded at 3:17 P.M.)  
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UNITED STATES OF AMERICA  
DISTRICT OF NEW MEXICO

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regulations of the Judicial Conference of the United States.

Dated this 17<sup>th</sup> day of October 2023.

S/Electronically Filed  
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